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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

314-617

No. 169

RICHARD W. LECHE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MARTIN W. LITTLETON, JR.,
Counsel for Petitioner.

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To the Honorable the Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

The petitioner, Richard W. Leche, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered March 13, 1941, (R. 1101) affirming a judgment of conviction for using the mails in furtherance of a scheme to defraud.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 1099-1101) is reported in 118 F. (2d) 246. The opinion of the

District Court overruling demurrer (R. 34-50) is reported in 34 Fed. Supp. 982.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered March 13, 1941 (R. 1101) and petition for a rehearing (R. 1105-1144) was denied March 9, 1941 (R. 1145). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925. See also Rule 11 of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

Questions Presented.

1. As to the scheme to defraud:

(a) Whether failure "to exercise business prudence" or "discretion" constitutes a scheme to defraud within the purview of the Mail Fraud Statute (Sec. 215, Criminal Code, 18 U. S. C. A. 338).

(b) Whether the trial court may, after an indictment has been tried upon the scheme to defraud therein charged and by the means therein alleged, instruct the jury to disregard as surplusage the sole averment of fraud and the two and only two false representations therein set forth and submit the case to the jury upon a charge, not alleged in the indictment, without destroying the indictment, ousting the jurisdiction of the court and depriving the petitioner of due process of law.

2. As to the use of the mails:

(a) Whether the forwarding of a draft by a bank, which cashed it for one of the defendants, in a cash letter containing other checks and drafts to its correspondent bank in an-

other city, which, thereafter, forwarded it in a cash letter with other checks and drafts to its correspondent bank in a third city, a bank other than the one on which the draft was drawn, may be the basis of a charge that the defendants knowingly caused the draft to be delivered by mail "according to the direction thereon".

(b) Whether delivery of a letter which shows on its face that it was in reference to a particular transaction outside of and not a part of the fraudulent scheme could be for the purpose of executing such scheme or attempting so to do.

(c) Whether use of the mail, after the scheme was executed, could be for the purpose of executing such scheme or attempting so to do.

(d) Whether the jury may, from the fact that "it had been established beyond a reasonable doubt that the drafts were in Shreveport at one time and that they turned up in Alexandria" infer that they had been delivered by mail and, from that inference, further infer that the defendants knowingly caused them to be delivered by mail "according to the direction thereon".

3. Whether an indictment, which in one count alleges that the defendants on two separate and distinct occasions entered into an agreement to sell to and purchase for the Louisiana Highway Commission, without complying with the State statute requiring competitive bids and contracts, two separate and distinct quantities of trucks, each agreement contemplating but a single purchase, alleges two separate and distinct schemes and is duplicitous.

4. Whether petitioner received a fair and impartial trial as guaranteed to him by the Constitution of the United States.

Statute Involved.

The pertinent provisions of the Mail Fraud Statute (Sec. 215, Criminal Code; U. S. C., Title 18, Sec. 338) are as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, * * *, or shall knowingly cause to be delivered by mail according to the direction thereon * * * any * * * letter * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

Statement.

An indictment in three counts was returned against petitioner, one L. P. Abernathy and one George B. Younger in the District Court for the Western District of Louisiana, charging violations of the Mail Fraud Statute (R. 1-16). Abernathy and Younger at the opening of the trial withdrew their pleas of not guilty and pleaded guilty (R. 56), and after the trial and sentence of the petitioner were sentenced to pay fines of $1000 and $3000 respectively (R. 68).

Petitioner, proceeding to trial alone, was convicted upon three counts of the indictment (R. 74) and sentenced to imprisonment for ten years, five years on the first count and five years on the second count, the sentence on the second count to run consecutively with the sentence on the first count. Imposition of sentence on the third count was suspended and the petitioner ordered placed on non-active probation (R. 75).

The indictment charges [1] that the defendants, Leche, then governor of the State of Louisiana, Abernathy, then chairman of the Louisiana Highway Commission, and Younger, of the Younger Motor Truck Company, devised "a scheme or artifice to defraud, and for obtaining money and funds by means of false and fraudulent pretenses, representations and promises" in the sum of $111,370.56 from the Louisiana Highway Commission. The indictment in general terms charges that the defendants sold to and purchased through the Younger Motor Truck Company, for the Louisiana Highway Commission, International trucks, and thus caused the Louisiana Highway Commission to pay to the Younger Motor Truck Company in October, 1937 and September, 1938 for two purchases of a total of 233 trucks, $397,332.05, of which $268,069.59 represented the cost of the trucks, $17,891.90 the freight and taxes, and $111,370.56 profit distributed by the Younger Motor Truck Company, George Younger and one James Thomas.

The indictment then proceeds to more particularly describe the scheme and alleges that the defendants on August 1, 1937, entered into an agreement to sell to and purchase for the Louisiana Highway Commission 138 trucks invoiced under date of October 5, 1937, and paid by checks of the Louisiana Highway Commission issued and caused to be issued by the defendants on October 13, 1937 for $227,173.54, of which sum $157,864.01 represented the cost of the trucks to the defendants, $11,378.47 the freight and taxes, and

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[1] Conclusions of the pleader (*Boykin* v. *United States*, 11 F. (2d) 484; *Middlebrooks* v. *United States*, 23 F. (2d) 244) and allegations by way of recital (*Dalton* v. *United States*, 127 Fed. 544, 547; *Ader* v. *United States*, 284 Fed. 1324; *Harris* v. *United States*, 104 F. (2d) 41, 45) are not averments of fact to be considered in determining the sufficiency of the indictment and, of course, have been excluded and only averments of fact set forth.

$57,931.06 profit distributed through the Younger Motor Truck Company, George Younger and James Thomas.

The indictment further alleges that a year later the defendants on July 25, 1938, entered into an agreement to sell to and purchase for the Louisiana Highway Commission 95 trucks invoiced under date of September 15, 1938, and paid by warrant of the Louisiana Highway Commission issued and caused to be issued by the defendants on September 16, 1938, for $170,158.51, of which $110,205.58 represented the cost of the trucks to the defendants, $6,513.43 the freight and taxes, and $53,439.50 profit distributed through the Younger Motor Truck Company, George Younger and James Thomas.

The indictment further alleges that the defendants failed and refused to comply with the laws of the State of Louisiana, requiring all political subdivisions of the State, before the purchase of materials or supplies in excess of $500, to advertise for bids, because the defendants knew that bids would be submitted for the sale of the trucks by other truck manufacturers at prices as low as the defendants could obtain from such manufacturers and the defendants would thus be prevented from collecting from the Louisiana Highway Commission a profit of approximately $111,370.56 on the sales and purchases of trucks invoiced to the Louisiana Highway Commission under dates of October 5, 1937 and September 15, 1938, of which sum $56,953.44 was distributed to the Younger Motor Truck Company and George Younger, $54,417.12 to James Thomas, who subsequently distributed $31,000 of this amount to Richard W. Leche.

The indictment then sets forth two and only two false representations:

(1) On October 5, 1937, that the Louisiana Highway Commission was indebted to the Younger Motor Truck Company

in the sum of $227,173.54 for 138 trucks delivered by the defendants through the Younger Motor Truck Company, whereas in truth and in fact, as the defendants knew, the trucks were purchased by the defendants at a cost of $169,-242.48, including freight and taxes, which sum was all that was due by the Louisiana Highway Commission "because it was approximately the amount that the manufacturers of the said trucks and equipment would have, without the interference of the said defendants, sold the motor trucks and equipment to the Louisiana Highway Commission under legal and competitive bids and contracts."

(2) On September 15, 1938, that the Louisiana Highway Commission was indebted to the Younger Motor Truck Company in the sum of $170,158.51 for 95 trucks delivered by the defendants through the Younger Motor Truck Company, whereas, in truth and in fact, as the defendants knew, the trucks were purchased by the defendants at a cost of $116,719.01, including freight and taxes, which sum was all that was due by the Louisiana Highway Commission "because it was approximately the amount the manufacturers of the said trucks and equipment would have, without the interference of the said defendants, sold the motor trucks and equipment to the Louisiana Highway Commission under legal and competitive bids and contracts."

Briefly summarized, the indictment alleges that the defendants devised a scheme to defraud the Louisiana Highway Commission by purchasing trucks for the Commission from the Younger Motor Truck Company without advertising for bids as required by law.

The indictment was tried from the time of its filing to the charge of the court upon the theory that the State statute required the defendants to advertise for bids before purchasing the trucks and that the defendant's failure and

refusal to comply with this statute constituted the basis of the scheme to defraud therein charged.[2]

The district court, however, in its charge instructed the jury:

> "This particular statute that was referred to, and apparently relied upon, is very questionable, that is, in its application to a transaction of this sort in the use of the words 'materials and supplies'. It may be seriously doubted as to whether that includes capital investments or equipment such as trucks and so forth which may be the loophole through which those matters were carried on as these were. But in any event you may put that statute aside. You are not to consider it here. Regardless of that, there still remains the duty upon every one connected with the matter to exercise discretion" (R. 767).

and later at the request of the prosecutor added:

> "Yes, gentlemen, in view of the ruling which I have made with respect to the State statute on the question of requiring bids, as I said a while ago, that statute says that every contract for more than five hundred dollars for the purchase of material and supplies, that bids and advertisement should be made. Well, now, supplies do not necessarily mean equipment or capital investment like the purchase of trucks. Materials do not necessarily include that and for that reason I have withdrawn that statute entirely although there is mention of it in the indictment. You should disregard that as surplusage."

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[2] See opinion overruling demurrer (R. 48); statement of the court as to its understanding of the contention of the government as made in the indictment and in its opening statement (R. 172); statement of the prosecutor (R. 173); motion for directed verdict by defendant on ground that statute requiring bids did not apply (R. 695); statements of government counsel in summation, commenting on defendants' failure to do their public duty and advertise for bids (R. 700-702-703); charge of the court at time of withdrawing statute that it was "apparently relied upon" (R. 767).

Upon review, the Circuit Court of Appeals found:

> "The district court instructed the jury that it was doubtful whether the state law required the defendants to advertise for bids, and to disregard that question, since, without the statute, there still remained the duty to exercise business prudence. We think the court committed no error in this respect, because the averment as to the requirement under the state law was wholly immaterial and unnecessary."

The use of the mails made the basis of the first count of the indictment, was that the defendants, on October 14, 1937, caused to be delivered by mail, to the Guaranty Bank and Trust Company, Alexandria, Louisiana, a certain letter under registry number 34135 and voucher checks, the letter and checks being set forth in full in the indictment (R. 8-12). The use of the mails made the basis of the second count, was that on September 20th, 1938, defendants caused to be delivered by mail to the Rapides Bank and Trust Company in Alexandria, Alexandria, Louisiana a certain sight draft drawn on the Guaranty Bank and Trust Company by the Younger Motor Truck Company, by George Younger, on September 17th, 1938, for the sum of $22,000.00 payable to James Thomas, the sight draft being set forth in full (R. 13-14). The use of the mails made the basis of the third count, was that the defendants caused to be forwarded by mail, a certain sight draft drawn by the Rapides Bank and Trust Company, dated September 21st, 1938, payable to the Commercial National Bank, Shreveport, Louisiana, for the amount of $35,026.23, in which amount was included the $22,000.00 collected by the Rapides Bank and Trust Company from the Guaranty Bank and Trust Company, on the sight draft drawn by the Younger Motor Truck Company to James Thomas (R. 14-16).

Petitioner, demurred to the indictment which was overruled (R. 35). The Government was ordered to furnish, and did furnish, a bill of particulars as to the mailings made the basis of the second and third counts of the indictment (R. 50). Motions for a new trial and in arrest of judgment were denied (R. 66).

As the sufficiency of the evidence must, of course, be judged with respect to the offense actually alleged in the indictment, *Walker* v. *United States,* 104 F. (2d) 465, 469, the district court's action in striking out the scheme to defraud actually alleged and in submitting the case to the jury on a charge not alleged in the indictment, renders not only unnecessary but impossible any orderly or proper discussion of facts. Suffice it to say the record is barren of any substantial evidence establishing petitioner's participation in any scheme to defraud.

Reasons Relied Upon for Granting Writ.

1. In holding that failure "to exercise business prudence" constituted a scheme or artifice to defraud within the purview of the Mail Fraud Statute, the Circuit Court of Appeals has decided an important and novel question of Federal law, which has not been, but should be, settled by this Court, and has decided that question in a way probably in conflict with decisions of this Court, other Circuit Courts of Appeals and of decisions of the same Circuit. The ruling of the Circuit Court eliminating fraud from a scheme to defraud is such an expansion of the statute by judicial construction and such a revolutionary rewriting of the Act as to require the exercise of this Court's supervisory jurisdiction. The district court's action, affirmed by the Circuit Court, in striking out a material part of the indictment and submitting the case to the jury on a charge other than that actually charged and tried was "a sheer denial of due process" and violated petitioner's rights guaran-

teed to him by the Fifth Amendment to the Constitution of the United States.

2. The decision of the Circuit Court of Appeals affirming the judgment of conviction as to the use of the mails made the basis of the three counts of the indictment is in clear conflict with the decisions of other Circuit Courts of Appeals in the cases of *Mitchell* v. *United States,* 118 F. (2d) 653; *Dyhre* v. *Hudspeth,* 106 F. (2d) 286; *Whealton* v. *United States,* 113 F. (2d) 710; *United States* v. *Baker,* 50 F. (2d) 122; *Mackett* v. *United States,* 90 F. (2d) 462.

3. The ruling of the Circuit Court of Appeals that the indictment is not duplicitous is in clear conflict with the decision of the Circuit Court of Appeals in *United States* v. *Siebricht,* 59 F. (2d) 976.

4. In overruling the claim that petitioner was denied a fair trial, the Circuit Court of Appeals so far sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory jurisdiction, and it, likewise, decided Federal questions in a way probably in conflict with applicable decisions of this Court and the decisions of other Circuit Courts of Appeals.

ARGUMENT.

I.

Although the indictment charged that a penal statute of the State of Louisiana (Act 20 of 1935, Dart's Gen. Stat. Sec. 6730, *et seq.*) required the defendants to advertise for bids before purchasing the trucks (R. 6), and was tried by the court, government and petitioner upon the theory that the defendants' failure and refusal to comply with this statute constituted the basis of the scheme to defraud

therein charged,[3] the district court instructed the jury that it was doubtful whether the State statute required the defendants to advertise for bids and to disregard that question, since, without the statute, there still remained "the duty upon every one connected with the matter to exercise discretion" (R. 767), and later, at the request of the prosecutor (R. 779), withdrew "that statute entirely" and instructed the jury to disregard "mention of it in the indictment" as surplusage (R. 779-800).

Upon review, the Circuit Court of Appeals found that the district court "committed no error in this respect, because the averment as to the requirement under the State law was wholly immaterial and unnecessary," and that "without the statute, there still remained the duty to exercise business prudence." It is clear that petitioner, indicted for using the mails to defraud, was convicted of failing "to exercise discretion", and that the Circuit Court of Appeals, to affirm the judgment of conviction herein, was forced to hold that failure to exercise "business prudence"—"discretion" re-edited—constituted a scheme to defraud within the meaning of the Mail Fraud Statute.

If failure "to exercise business prudence" becomes a Federal offense upon the mailing of a letter, Sec. 215 of the Criminal Code becomes by judicial construction not a "mail fraud", but a "business prudence" statute, lacking every essential element of a scheme to defraud as that term has been traditionally understood.

The crime denounced by Sec. 215 is a "scheme or artifice to defraud or for obtaining money or property by means of

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[3] See opinion overruling demurrer (R. 48); statement of the court as to its understanding of the contention of the government as made in the indictment and in its opening statement (R. 172); statement of the prosecutor (R. 173); motion for directed verdict by defendant on ground that statute requiring bids did not apply (R. 695); statements of government counsel in summation, commenting on defendants' failure to do their public duty and advertise for bids (R. 700, 702, 703); charge of the court at time of withdrawing statute that it was "apparently relied upon" (R. 767).

false or fraudulent pretenses or representations or promises." The statute does not even embrace all dishonest methods of deprivation, but only those "in the nature of deceit or fraud as known to the law or as generally understood." *Fasulo* v. *United States,* 272 U. S. 620, 629. "Without deceit there can be no fraud in the legal sense of the word. No fraud can be committed but by deceitful practices; practices calculated to deceive." *United States* v. *Watkins,* 29 Fed. Cas. 418, 437. "These quoted words (scheme or artifice to defraud) show unmistakably that the victim's money must be taken from him by deceit." *Naponiello* v. *United States,* 291 Fed. 1008.

Deceit, therefore, is a basic element and an essential ingredient of a scheme to defraud. "Prudence", on the other hand, as defined in the New Century Dictionary, is "the quality or fact of being prudent; cautious; practical wisdom; good judgment; discretion; regard for one's own interest; provident care in management; economy or frugality."

Failure "to exercise business prudence" and fraud, both in their nature and effect, are as far apart as the two poles. Failure to "exercise business prudence" is simply the failure to exercise the virtue of prudence in business and in no way partakes of deceit, while fraud is deceit or trickery deliberately practiced.

The words of the act suggest no intention to include failure to exercise "business prudence". It was not permissible for the court to search for and read into the statute an intention that the words themselves do not suggest. "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." *Fasulo* v. *United States,* 272 U. S. 620, 629.

The ruling of the circuit court takes the fraud out of a scheme to defraud, hurls Section 215 into the field of civil

nal. Expanding the statute by construction to include faillaw and renders acts, never before regarded as such, crimiure "to exercise business prudence" was an unconstitutional assumption of the legislative powers of Congress and a revolutionary rewriting of the Mail Fraud Statute.

But even if we indulge in the illogical and untenable assumption that a scheme to defraud embraces failure "to exercise business prudence", an examination of that part of the indictment setting forth the scheme to defraud (R. 1-8) makes it evident that neither failure "to exercise discretion" or "business prudence" is therein charged.

There is no fact therein averred charging the defendants with "the duty to exercise business prudence" or "discretion". There is no language therein used, which by the wildest stretch of the imagination, could be construed as setting forth any such charge. Particulars of failure "to exercise business prudence" or "discretion" are nowhere alleged.

Charging the defendants with having devised a scheme to defraud alone is not sufficient. *United States* v. *Hess,* 124 U. S. 486. "The scheme to defraud, while not the gist of the offense, should, of course, be set out with sufficient particularity and definiteness to advise the defendant as to the particulars thereof." *Boatwright* v. *United States,* 105 F. (2d) 737, 738. Particulars of the scheme are matters of substance and their omission cannot be supplied by intendment or implication. *United States* v. *Hess,* 124 U. S. 486; *Harris* v. *United States,* 104 F. (2d) 41, 45; *Brooks* v. *United States,* 146 Fed. 223, 231. "An allegation of fraud is insufficient, either in an indictment or in a bill in equity, without giving the particulars of the fraud." *Evans* v. *United States,* 153 U. S. 584, 594; *Bannon* v. *United States,* 156 U. S. 469.

The conviction of the petitioner upon a charge of failure to exercise "discretion" or "business prudence" was a conviction upon a charge not alleged in the indictment. As

said by this Court in *Thornhill* v. *Alabama*, 310 U. S. 87, 96: "Conviction upon a charge not made would be a sheer denial of due process."

Moreover, an examination of the indictment and the authorities applicable thereto makes it clear that "the averment as to the requirement under the State law", branded by the district court as "surplusage" and by the Circuit Court of Appeals as "wholly immaterial and unnecessary", is an essential element of the scheme to defraud charged and a material part of the indictment.

A scheme to defraud consists of two elements: (1) the scheme to defraud, and (2) the means by which it is to be carried out. *Sunderland* v. *United States*, 19 F. (2d) 202, 207; *Silkworth* v. *United States*, 10 F. (2d) 711, 714; *Gourdain* v. *United States*, 154 Fed. 453, 457. In considering the sufficiency of an indictment, the scheme to defraud and the means by which it is to be carried out must be distinguished. *Muench* v. *United States*, 96 F. (2d) 332, 335.

"It has been settled by repeated decisions that a good indictment under this statute must allege not only that the defendant had devised a scheme or artifice to defraud, but it must also set out clearly what the artifice was wherein the fraud consisted, and how it was to be accomplished, and that charging the offense in the words of the statute alone is not sufficient. *United States* v. *Hess*, 124 U. S. 486; *Stokes* v. *United States*, 157 U. S. 187." *Etheredge* v. *United States*, 186 Fed. 436.

The indictment as found by the grand jury, irrespective of the question of duplicity, sufficiently charged a scheme to defraud within the Mail Fraud Statute. It alleged not only that the defendants had devised "a scheme and artifice to defraud and for obtaining money and funds by means of false and fraudulent pretenses, representations and promises," but it "also set out clearly what the artifice

was wherein the fraud consisted," namely, that the defendants failed and refused to comply with the State statute requiring advertisement for bids, and "how it was to be accomplished," namely, by means of the two, and only two, false representations and pretenses therein set forth.

However, upon eliminating the averment as to the requirement under the state law, there is no fact averred charging the defendants or any of them with any duty or with the violation of any duty in relation to the purchase of the trucks. There is no fact averred showing that the defendants were in a position to commit fraud in the purchase of the trucks or that they violated any trust in so doing.

While the indictment charges that the petitioner was Governor of the State of Louisiana and Abernathy, Chairman of the Louisiana Highway Commission, it nowhere discloses the duties of the Governor or the duties of the Chairman of the Highway Commission, or the duties, if any, that petitioner, as Governor, or Abernathy, as Chairman, owed to the Highway Commission, in relation to the purchase of the trucks, other than the duty to advertise for bids.

An indictment charging a conspiracy or scheme to defraud the State, whereby an official was to secretly receive a portion of what was paid for supplies furnished on his requisition, must disclose the duties of such official and the duties that he owed to the State in relation to the purchase of said supplies. *Crawford* v. *United States*, 212 U. S. 183, 191. An indictment charging a public official and others with a scheme to defraud the State must set out an agreement to defraud the State and facts showing that the parties charged were in a position to commit the fraud. *United States* v. *Gouled*, 253 Fed. 239, 242. *Gouled* v. *United States*, 273 Fed. 506. The averment as to the requirement

under the State law is the sole allegation charging the defendants with any duty or obligation in relation to the purchase of the trucks, and the sole allegation charging a violation of any duty or trust. Eliminating the averment as to the requirement under the State statute, the indictment is fatally defective.

Moreover, this averment is the sole averment of fraud set forth in the indictment. The statute requiring advertisement for bids was enacted to prevent fraud in the purchase of materials and supplies, and the charge that the defendants failed and refused to comply with such a statute is a charge of fraud. Eliminating the averment as to the requirement under the State statute, there is no fact averred charging the defendants with "anything in the nature of deceit or fraud as known to the law or as generally understood." There is no fact averred setting forth "what the artifice was wherein the fraud consisted." The averment as to the requirement under the State statute, the sole allegation setting forth "what the artifice was wherein the fraud consisted", is a material part of the indictment.

No stronger proof of its materiality could be furnished than the pleader's own words. The indictment alleges that the defendants failed and refused to comply with the State statute *because* the defendants knew that bids would be submitted by motor truck manufacturers for the sale of said trucks at prices as low as the defendants could obtain from such manufacturers, and the defendants "would thus be prevented from collecting from the Louisiana Highway Commission" a profit on the sales and purchases of trucks invoiced to the Louisiana Highway Commission on October 5, 1937, and September 15, 1938 (R. 6). The indictment thus alleges that it was only because the defendants failed to advertise for bids that they were able to purchase the trucks through the Younger Motor Company for the Louisi-

ana Highway Commission and divide the profits therefrom, that is, without their failure and refusal to comply with the State statute, there would have been no purchase of trucks as therein charged, no profit to be divided, and no scheme to defraud the Louisiana Highway Commission.

The fact that the district court found it necessary, after striking out this averment, to frame and substitute its own charge of failure "to exercise discretion", a charge not alleged in the indictment, and the fact that the Circuit Court found it necessary to re-edit the charge submitted to the jury and to substitute therefor its own charge of failure to exercise "business prudence", would seem to conclusively establish the materiality of the averment in question.

Moreover, the indictment not only alleges that the defendants failed and refused to comply with the State statute requiring competitive bids and contracts, but from its filing to the closing moments of the trial, when the court instructed the jury, was tried upon the theory that defendants' failure and refusal to comply with the statute constituted the basis of the scheme therein charged. It is elementary that a case may not be tried upon one charge and submitted by the court to the jury on an entirely different charge, without depriving the defendant of his day in court.

In addition thereto, when the district court "withdrew that statute entirely" and directed the jury to disregard "mention of it in the indictment" as surplusage, it withdrew not only the averment as to the requirement under the State statute but, in addition thereto, every allegation in the indictment therein affirmatively shown to have been based and founded by the grand jury on the defendants' failure and refusal to comply with that statute.

An examination of that part of the indictment (R. 7-8) which sets forth the two and only two false representa-

tions therein contained, makes it evident that the grand jury based its finding that each of said pretenses was false, and wherein and in what particular it was false, on its specific finding that the law required the defendants to advertise for bids. It therefore follows that when the district court withdrew from the consideration of the jury this specific charge, it withdrew in addition thereto the two and only two false representations set forth in the indictment.

It is elementary that to sustain an indictment charging a scheme to defraud by means of false representations, at least one of the false representations therein alleged must be proved. *Popham* v. *United States*, 11 F. (2d) 966; *Belt* v. *United States*, 73 F. (2d) 888, 889; *Sasser* v. *United States*, 29 F. (2d) 950, 951; 2 Bishop's Criminal Law 418.

As said by this Court, "When the pretenses or representations or promises which execute the deception and fraud are false, they become the scheme or artifice which the statute denounced." *United States* v. *New South Farm and Home Company*, 241 U. S. 64-70.

As the two and only two false representations and pretenses set forth in the indictment went out with the withdrawn statute upon which they were based, it is clear that the two essentials of a scheme to defraud were eliminated, to-wit: (1) the artifice wherein the fraud consisted, namely, failure and refusal to comply with the statute requiring bids, and (2) the means of carrying out the fraud, namely, the two and only two false representations and pretenses set forth in the indictment.

It is fundamental that no essential element of an offense can be omitted without destroying the entire pleading. It matters not whether such omission occurs through the fault of the pleader in drawing the indictment, or through the fault of the trial court in striking out a material part thereof as surplusage. An allegation necessary to the validity of the indictment cannot be treated as surplusage.

When the trial court ruled that the State statute requiring competitive bids and contracts did not apply to the purchase of trucks, nothing remained for the court to do but to instruct the jury that the government had failed to prove a material part of the indictment and direct a verdict of not guilty.

Its action in striking out a material part of the indictment destroyed the entire pleading and ousted its jurisdiction. Its continuance of the trial and submission of the case to the jury on its own charge of failure "to exercise discretion", a charge not alleged in the indictment, was in violation of petitioner's rights under the Fifth Amendment to the Constitution of the United States, and a "sheer denial of due process." *Ex parte Bain,* 121 U. S. 1; *United States* v. *Norris,* 281 U. S. 619, 622; *Thornhill* v. *Alabama,* 310 U. S. 87, 96.

II.

The use of the mails made the basis of the first count was that the defendants caused to be delivered by mail to the Guaranty Bank and Trust Company, Alexandria, Louisiana, a certain letter under registry No. 34135 and voucher checks. The letter and voucher checks are set forth in full in the indictment (R. 9-12). The letter was written by the auditor of the Louisiana Highway Commission at the request of George Younger, President of the Younger Motor Truck Company and was placed in the mail at Baton Rouge. The voucher checks (R. 10-12) were four in number, three of which were drawn on the American Bank and Trust Company, New Orleans, La., and the fourth on the City National Bank, Baton Rouge, La. The letter states in part:

> "You will note that Mr. Younger receipted these vouchers and endorsed same payable to your order which we understand is in accordance with his agreement with your bank."

The letter shows on its face that the voucher checks were not forwarded to the Guaranty Bank and Trust Company to be paid, as said checks were drawn on banks in New Orleans, Louisiana, and Baton Rouge, Louisiana, but were forwarded to the bank in accordance with an agreement between Younger and the bank, outside of and not a part of the fraudulent scheme. It also shows that Younger receipted the vouchers and endorsed the checks payable to his bank, before the mailing.

It is settled law that the mailing of a letter in the execution or the attempted execution of a fraudulent scheme is the gist of the offense denounced by the statute. It is that act and it alone which confers jurisdiction upon the courts of the United States to punish devisers of fraudulent schemes. *Whealton* v. *United States,* 113 F. (2d) 710. *Busch* v. *United States,* 52 F. (2d) 79-81. *Spillers* v. *United States,* 47 F. (2d) 893. It is evident that a mailing for the purpose of carrying out a contract, as in the instant case, outside and not a part of the fraudulent scheme, cannot be for the purpose of executing the scheme or attempting so to do. *McLendon* v. *United States,* 2 F. (2d) 660. *United States* v. *Quinby,* 51 F. (2d) 167.

The use of the mails made the basis of the second count was that on September 20, 1938, defendants caused to be delivered by mail to the Rapides Bank & Trust Company in Alexandria, Alexandria, Louisiana, a certain draft drawn on the Guaranty Bank and Trust Company of Alexandria by the Younger Motor Truck Company by George Younger on September 17, 1938, for the sum of $22,000, payable to James Thomas, bearing the notation "commission on trucks". This draft represented payment to Thomas of a commission by Younger on the 1938 sale of 95 trucks. Thomas endorsed and deposited this draft in the City National Bank of Baton Rouge on September 17, 1938 (G-44, R. 972), and on the same date the City National Bank

credited Thomas' account with $22,000 (G-45, R. 973). The City National Bank of Baton Rouge thereupon forwarded the draft and other checks in a cash letter totalling $26,576.28 to the Commercial National Bank in Shreveport (R. 272-273, G-66, R. 1005). The Commercial Bank in turn forwarded the draft and other checks in a cash letter totalling $22,073.82 to the Rapides Bank & Trust Company in Alexandria (R. 327-329, 335-336, 341). The Rapides Bank & Trust Company sent it by special messenger to the Guaranty Bank & Trust Company and it was cleared (R. 336). The delivery of this draft to the Rapides Bank & Trust Company is the basis of the charge in the second count that the defendants knowingly caused the draft to be delivered by mail according to the direction thereon. The Government was ordered to and did file a bill of particulars as to the mailing in this count (R. 50-52). The bill of particulars alleged (R. 51) that this sight draft "was part of the illegal profit obtained under the scheme and artifice to defraud and was that portion of said profits which was collected from the said Louisiana Highway Commission by the said defendant, George Younger, on the sale of trucks made by the said defendant, George Younger, under said scheme and artifice to defraud in September, 1938, and which was rebated to James Thomas for the account of the said defendant Richard W. Leche."

The indictment charged a specific scheme for the purpose of defrauding the Louisiana Highway Commission out of a definite sum of money. The bill of particulars, as hereinbefore set forth, alleges that this $22,000 draft was a part of the monies collected from the Louisiana Highway Commission by Younger "under the scheme". It is evident that the mailing of the draft could not be for the purpose "of executing" a scheme to defraud, which the bill of particulars alleges had already "been executed." The bill of particulars alleges that this draft "was part of the illegal

profit obtained under the scheme and artifice to defraud and was collected from the Louisiana Highway Commission." A profit already obtained "under the scheme" cannot possibly be for the purpose of executing the scheme. The scheme was consummated and completed when Younger received his money from the Louisiana Highway Commission. The use of the mails after the scheme has been executed cannot be for the purpose of executing the schemes within the intent and meaning of Section 215. *Mitchell* v. *United States,* 118 F. (2d) 653; *McNear* v. *United States,* 65 F. (2d) 861; *Dyhre* v. *Hudspeth,* 106 F. (2d) 286; *Armstrong* v. *United States,* 65 F. (2d) 853; *Little* v. *United States,* 73 F. (2d) 861; *Stewart* v. *United States,* 119 Fed. 89; *Merrill* v. *United States,* 95 F. (2d) 669.

Further than this, the ledger sheet of the City National Bank of Baton Rouge under date of September 17, 1938, shows the credit to Thomas' account of this $22,000 draft and an immediate charge against the account of checks for $10,020.03 and $2,410.36 (R. 973). The ledger sheet further shows that these checks could not have been paid without the bank crediting the $22,000 draft to Thomas' account, as the account before the deposit was insufficient. The law is settled that the legal effect of the bank crediting the check to Thomas' account was the ordinary case of the transfer or sale of the check by Thomas, and the purchase of it by the bank, and upon its delivery to the bank the title to the check passed to the bank and it became the owner thereof. *Burton* v. *United States,* 196 U. S. 283; *City of Douglas* v. *Federal Reserve Bank,* 271 U. S. 489; *Daykin* v. *Bayly,* 290 U. S. 143. In *Daykin* v. *Bayly* this Court states: "In the ordinary case unrestricted endorsement and deposit of checks * * * would create the relation of debtor and creditor. The bank would collect the item not as agent for the depositor, but as owner."

The $22,000 draft was sent forward by the City National Bank of Baton Rouge to the Rapides Bank at Alexandria for the purpose of having that bank collect it from the Guaranty Bank & Trust Company, that is, the draft was sent forward to be paid, and the City National Bank was its owner when sent, and collected the draft as owner and not as the agent of Thomas. The action of the City National Bank in taking steps to obtain payment for itself of the draft of which it was the owner, can in no sense be said to be an action for the purpose of executing the scheme to defraud or attempting so to do, but the act of an owner in regard to its own property. *Burton* v. *United States,* 196 U. S. 283, 301.

The draft's connection with the scheme to defraud ended when Thomas sold the check to the bank. There was no use of the mails by the defendants or for the defendants. The use of the mails was the independent act of the Whitney Bank, independent of the defendants and independent of the scheme charged to have been devised by the defendants. The act of the City National Bank in causing the draft to be placed in the mails, if it was so placed, to be sent to the Rapides Bank & Trust Company of Alexandria, was the independent act of the bank, not in furtherance of the scheme charged and not caused by the defendants.

Moreover, the delivery of the draft in a cash letter to the Rapides Bank and Trust Company, a bank other than the one on which it was drawn, could not have been foreseen by Thomas at the time he deposited the draft in the bank at Baton Rouge so as to charge him with "knowingly causing the draft to be delivered according to its direction thereon." While "knowingly" does not require absolute knowledge or intent, the use of the mails must be such as

may fairly be foreseen by the defendant as a step in the execution of the scheme.

Moreover, the draft was not delivered by mail according to the direction thereon. The draft was drawn upon the Guaranty Bank and Trust Company and was delivered to that bank by special messenger. Delivery to the Rapides Bank and Trust Company was not a delivery of the draft "according to the direction thereon" nor could the delivery of the cash letter be a delivery according to the direction thereon. A cash letter could contain any number of checks and thus delivery of the one cash letter could be the basis of any number of different charges against any number of different persons for any number of different schemes to defraud. It would seem as though the Government has gone a long way to seize upon the mailing made the basis of the second count.

Further than this, there is no proof of the mailing on the second count. The trial court said (R. 768, 769), "It has been established beyond a reasonable doubt that the drafts were in Shreveport at one time and that they turned up in Alexandria. Now the issue of fact there is how did they get here?" There was no proof of mailing to sustain counts two and three. *United States* v. *Baker,* 50 F. (2d) 122; *Whealton* v. *United States,* 113 F. (2d) 710; *Mackett* v. *United States,* 90 F. (2d) 462; *Freeman* v. *United States,* 20 F. (2d) 748.

The use of the mails made the basis of the third count was a draft drawn on the Whitney National Bank of New Orleans by the Rapides Bank & Trust Company, payable to the Commercial National Bank of Shreveport, in the sum of $35,026.23, covering the collection of the $22,000 draft and other items. It is evident that the mailing made the basis of the third count falls with the mailing made the basis of the second count.

III.

The petitioner demurred to the indictment on the ground, among others, that it was bad for duplicity (R. 17-19). The court overruled the demurrer in an opinion (R. 35-49).

A scheme to defraud, when shared among several, becomes a conspiracy. *United States* v. *Herzog*, 25 F. (2d) 487; *Van Riper* v. *United States*, 13 F. (2d) 961. It is elementary that the gist of a conspiracy is an agreement between two or more persons (*Cooper* v. *O'Connor*, 99 F. (2d) 135; *Tinsley* v. *United States*, 48 F. (2d) 890), and that a conspiracy is complete on the forming of the agreement. *Wilder* v. *United States*, 100 F. (2d) 177.

The indictment in one count alleges:

> (1) "That the said defendants would and did on or about August 1, 1937, enter into an agreement to sell to and purchase for the Louisiana Highway Commission * * * 138 motor trucks * * * invoiced to the Louisiana Highway Commission under date of October 5, 1937 * * * for a total sum of $227,-173.54", etc. (R. 4).
>
> (2) "That the defendants would and did on or about July 25, 1938, enter into an agreement to sell to and purchase for the Louisiana Highway Commission * * * 95 motor trucks * * * invoiced to the Louisiana Highway Commission under date of September 15, 1938 * * * for $170,158.51", etc. (R. 5).

The indictment further alleges (R. 6) that the said defendants did fail and refuse to comply with the laws of Louisiana requiring competitive bids and contracts prior to the purchase of said trucks invoiced to the Louisiana Highway Commission under date of October 5, 1937, and September 15, 1938. The indictment then sets forth (R. 7-8) two false and fraudulent pretenses, representations and promises, one made on October 5, 1937, in reference to the sale of 138 trucks, and the other made on September

15, 1938, in reference to the sale of 95 trucks. The indictment thus alleges all the essential particulars of two separate and distinct schemes.

It is evident that the indictment alleges two agreements, that is, two schemes, one devised on August 1, 1937, in reference to the purchase of 150 trucks, and the other devised on July 25, 1938, in reference to the purchase of 95 trucks. While the indictment alleges that each of said schemes was a further part of a general scheme devised by the defendants in reference to the sale and purchase of 233 trucks, it is clear that the facts alleged and not the conclusion of the pleader must govern in determining the question.

Moreover, the evidence produced at the trial by the Government establishes two separate and distinct schemes. Both Thomas (R. 398, 399) and Abernathy (R. 672, 673), witnesses called by the Government, testified that the only thing discussed at the meeting when the first agreement was made, was the purchase of 150 trucks and equipment therefor (R. 685). There is not the slightest evidence that, at this time, a second purchase was contemplated. Thomas (R. 412, 413), the only witness who testified to a second meeting, a year later, on July 25, 1938, when the second agreement was entered into, testified as follows:

> Q. "That was a separate new transaction?"
> A. "Yes."
> Q. "And had no connection with the previous transaction of 138 trucks, did it?"
> A. "No."
> Q. "It was separate and distinct?"
> A. "That's right."

As said by the court in *United States* v. *Siebricht*, 59 F. (2d) 976, "It is nothing but guesswork to say that the second purchase was contemplated when the first was undertaken or that the two transactions were part of a general plan."

The use of the mails (R. 8-12) made the basis of the first count of the indictment related solely to the first scheme and had nothing to do with the second scheme. The use of the mails made the basis of the second count (R. 13) of the indictment related solely to the second scheme and had no relation or connection with the first scheme.

As petitioner was sentenced to imprisonment for five years on the first count and to imprisonment for five years on the second count, said sentences to run consecutively, it is evident that his substantial rights have been greatly prejudiced by the joinder of the two separate and distinct offenses in one count of the indictment. Section 1024 of the Revised Statutes (18 U. S. C. A. 557) permits the joinder of two separate offenses in one bill or indictment under certain circumstances, but directs that each offense shall be charged in a separate count. If the two schemes to defraud had been charged in separate counts, separate verdicts would have been required. Petitioner, before being sentenced to five years on each count, was entitled to a separate judgment on each of the two schemes.

The indictment in one count charges and the evidence establishes beyond any doubt two separate and distinct schemes entered into on two separate and distinct occasions. The indictment is clearly duplicitous.

IV.

A. Petitioner was cross-examined at great length as to his interest in a gas contract that one Feazel had with the United Gas Company and the money received by him therefrom (R. 622, 625-631, 648-649, 652-656, 665-666, 669-670). During the cross-examination petitioner was asked the following question and made the following answer (R. 631):

> Q. "Isn't it a fact that Thomas J. Hill gave you a 1/3 interest in that Feazel contract?"
>
> A. "It is not, sir."

The Court had refused to permit the Government to go into this contract as part of its direct case, ruling that there was no similarity between the two transactions (R. 595-608). It is therefore clear that petitioner's cross-examination was as to a collateral matter, and that the Government was bound by his answer.

However, Hill was called by the Government in rebuttal and questioned as follows:

> Q. "Are you interested with Richard W. Leche in a gas contract?"

And over the objection of petitioner, was permitted to answer:

> "If your Honor please, I would like to reserve to myself the right to decline to answer questions which might incriminate me in any way."
>
> The Court: "Mr. Hill, unquestionably, you have the constitutional right to decline to answer questions that may accuse you of crime yourself."
>
> By Mr. Rogge:
>
> Q. "Do I understand, Mr. Hill, in answering as to this particular contract, you are insisting upon your privilege against self-incrimination?"
>
> A. "Yes, sir."
>
> Mr. Rogge: "That is all."

The calling of Hill to contradict the petitioner on a collateral matter was highly improper, but the calling of Hill when the prosecutor knew that Hill would assert his constitutional privilege and refuse to testify, cannot be condoned. No lawyer ever calls a witness to the stand without first questioning that witness. The following statement of Government counsel (R. 176) in this very case illustrates this fact: "Before questioning the witness, Your Honor, I am familiar with what he intends to testify about."

But that was not all. Counsel for the Government, in summation, repeatedly referred to the Hill incident (R.

716, 720-722, 725, 750). In attacking petitioner's credibility by naming the persons he contradicted, the prosecutor went so far as to state "and he even also contradicts Tom Hill" (R. 716), and later he tells them "what Tom Hill had to say when he was asked to tell what he knew about this transaction"; although Tom Hill had said nothing.

> "Now, gentlemen, coming back to this same man Tom Hill again, you will remember that I asked him when I put him on the witness stand about his transactions with Leche. You will remember that Leche in his cross examination said that each and every one of these transactions were perfectly legitimate, that there was absolutely nothing wrong with any of them, and yet when I asked Hill on the stand to tell me what he knew about this very business transaction that Leche said was perfectly legitimate and all right, Hill's reply or answer to me was 'I refuse to answer on the ground my answer would incriminate me.' That is what Tom Hill says. That is what Tom Hill had to say when he was asked to tell what he knew about this transaction from which Leche received the amount of money he admitted receiving, namely, over Two Hundred Thousand Dollars up to date, and which Leche swore on that stand was a perfectly legitimate transaction."

This was nothing more or less than a deliberate attempt to convict the petitioner by any and all means, fair or foul. While a prosecutor "may strike hard blows, he is not at liberty to strike foul blows." *Berger* v. *United States*, 295 U. S. 78, 88.

B. Petitioner was cross-examined as to his various tax returns. The procedure followed in such examination was for the prosecutor to refer to the number of the item, read to petitioner the printed matter of said item together with any insertion made by petitioner, and then ask petitioner to explain such item. This examination was thorough and showed that a close study of the returns had been made by

the prosecutor. Petitioner was questioned regarding a $14,030.90 item appearing in his 1939 tax return (R. 633-634). Petitioner did not recognize the item of income and so stated, replying that his accountant had made out the return. Great capital was made of this by the Government in summation (R. 728-729):

> "You have that man getting on the stand and denying that he got the Thirty-one Thousand Dollars from Thomas, and yet an item of Fourteen Thousand Dollars is there that he cannot tell you where it came from. It is the fourth line, or the fourth item in this tax return. Do you gentlemen suppose that if you had gotten Fourteen Thousand Dollars from a certain transaction last year that you wouldn't remember where it came from? Yet Leche gets on the stand and tells you that very story and then wants you to believe him when he says he didn't get the Thirty-one Thousand Dollars from Thomas. He has an amount twice his salary, something that happened last year, and he goes on the stand and tells you that he doesn't know where it came from. Then he wants you to believe him when he says he didn't get the Thirty-one Thousand Dollars from Thomas."

The gross unfairness of it all was that the said item of $14,030.90 was not an item of income at all, but a loss, which item showed in red on the original return in possession of Government counsel, but did not show in red on the photostatic copy handed petitioner on the witness stand. Moreover, the prosecutor in questioning petitioner as to the printed item on the return, omitted the words "or loss" from the fourth printed item on the return, "Income (or loss) from business or profession." The photostatic copy of the return handed petitioner on the witness stand showed no breakdown of this item, but Government counsel had in his possession and thereafter offered in evidence (R. 1042) a return showing the breakdown of this very item. Such a misleading of petitioner was a grave de-

parture from the accepted and usual course of judicial proceedings.

C. According to the indictment and the contention of the Government, four persons: petitioner, Abernathy, Younger and Thomas (who was not indicted), participated in the alleged scheme to defraud. Abernathy and Younger on the day of the trial pleaded guilty. Thomas and Abernathy were called by the Government as witnesses, Thomas on direct, Abernathy in rebuttal. Petitioner, who was not a member of the Highway Commission nor charged with any duties in relation to the purchase of the trucks, proceeded to trial alone, not only unfamiliar with the details of the truck transactions, but with the parties who actually handled the transactions and details testifying for the Government.

The position of petitioner, who was tried after "a tremendous political upheaval took place in the state" (R. 179), to say the least, parallels the position of the defendant in *Crawford* v. *United States*, 212 U. S. 189, which so impressed this Court that it stated: "The defendant was peculiarly situated in this case, and great care was necessary to prevent injustice to him" (R. 203). "It is hardly possible to imagine a case where greater care was necessary in regard to the exclusion of proper and admissible evidence than in the one before us" (R. 205). And regarding the plea of guilty by a co-defendant under the same indictment, this Court said: "While this action of Matchem was not the slightest evidence of the guilt of defendant, * * * it left defendant without the aid of Matchem in the trial of the case" (R. 203).

Yet the "rule of care" laid down by this Court was not followed in the instant case. Thomas, the only witness to testify he gave any money to petitioner, and his testimony in this respect stands absolutely alone, being unconfirmed and uncorroborated by the testimony of any other witness,

by any document, any word, or any circumstance, and denied by petitioner (R. 613-614), on cross-examination was asked (R. 417):

> Q. "What was the occasion for making these payments to him?"

At this point Government counsel objected to "what defendant may have said as being self-serving." The court ruled that Thomas could answer the question. Thomas answered:

> "It was during the Sixth District Congressional Campaign. Governor Leche told me * * * ——"

At this point the Government again objected, this time on three grounds: that it made no difference what the defendant said, that his statement was "self-serving", and "hearsay"; and was sustained by the court because "it wouldn't make any difference if it was gotten from the state what he did with it."

Whether the money "was gotten from the state" and whether petitioner received any of it, were clearly facts to be determined by the jury, and the proper subject of cross-examination. The trial court not only found the fact itself, but actually used it as the basis of sustaining the objection, and thus prevented petitioner from challenging the uncorroborated statement of Thomas as to the alleged payments, a clear deprivation of petitioner's constitutional rights. This is one of the things which the appellate court "deemed to be not sufficiently meritorious to require special mention."

The indictment alleged that defendants entered into two agreements, one in August 1937 and one in July 1938. Thomas testified that in August 1937 and July or August 1938 petitioner, Abernathy and Thomas met on each occasion to discuss the purchase of trucks for the Highway Commission. Petitioner, called as a witness in his own

behalf, testified that neither of the two meetings testified to by Thomas ever took place, and further that he never discussed with Thomas the purchase of trucks at any time. Abernathy was called by the Government in rebuttal, and over the objection of petitioner was permitted to testify that in August 1937 there was a meeting in his office of the Highway Commission at which Leche, Abernathy and Thomas were present. The testimony of Abernathy was purely corroborative and in no way rebuttal, but part of the Government's main case, and its admission was an abuse of discretion which gravely prejudiced petitioner's rights. The fourth question asked of Abernathy by the prosecutor as he took the stand makes evident its purpose:

> Q. "And you pleaded guilty here on Monday?"
> A. "I did" (R. 672).

This error was accentuated by the quite incomprehensible refusal (R. 632-633) of the court to permit petitioner's counsel to examine Abernathy as to the second meeting in 1938, the court ruling that outside of questions affecting his credibility the cross-examination was limited to matters covered on direct examination (R. 682-683). Abernathy, having been allowed to testify in rebuttal, was subject to cross-examination on any issue in the case. The Government could not by the calling of an accomplice in rebuttal thus limit his cross-examination. A trial of a criminal case is not a game of thrust and parry. As said by this Court in *Berger* v. *United States*, 295 U. S. 78, 88: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Abernathy and Thomas were the only witnesses who gave testimony in reference to the petitioner. The Government, by continual objections mostly sustained by the court, prevented petitioner from challenging the statements of both. The curtailment of the cross-examination of the two alleged co-conspirators, Abernathy and Thomas, deprived the petitioner of his day in court.

D. Three prosecutors summed up for the Government. The misconduct of each was neither slight nor attributable to the heat and enthusiasm of advocacy, but so pronounced and persistent that it shows a studied effort to inject into the case irrelevant and prejudicial matters for the sole purpose of procuring a verdict of guilty at any and all costs. Continued appeals to prejudice and passion (R. 733, 735-736, 738-739), intemperate, abusive and over-zealous remarks, referring to the defendant as "the sort of animal that does not smell good, and some of you farmers know what I mean if you have been out in the field" (R. 740), "this 250 pounds of human flesh" (R. 738); appealing to individual jurors by calling them by name (R. 745); making the jurors both the victims of the scheme and the judges of petitioner (R. 745-746); characterizing the summation of counsel for petitioner as a plea of leniency (R. 748-749); calling attention to the fact that a counsel for the Government was executive head of the criminal division of the Department of Justice of the United States (R. 749-750); waving the American flag over the land of the free and the home of the brave (R. 748); and finally, placing duty above the pleasant relationship that existed between petitioner and the United States Attorney, and with sadness in heart asking in the name of justice for a verdict of guilty (R. 752); all of which is clearly repugnant to and violative of the sound principle laid down by Mr. Justice Roberts in his

dissenting opinion in the case of *United States v. Socony Vacuum Oil Company,* 310 U. S. 150, 264, as follows:

> "One of the most reprehensible things that a prosecutor can do is to attempt to put in evidence before the jury his own and his colleagues' opinion as to the guilt of the defendants he is prosecuting. Such a practice brings before the jury the unsworn testimony of a sworn officer of the government. This fact lends its undue and improper weight and injects an element into the case which is so insidious and so impossible to counteract that trial judges, in my experience, have never hesitated to withdraw a juror and declare a mistrial because of this violation of the canons."

E. Such erroneous statements of ABC facts of petitioner's case by the Circuit Court of Appeals in its abbreviated opinion, that petitioner was "a member of the Highway Commission" and the purchase of the trucks was a "purchase by the State", show such a fundamental misconception of the case as to have deprived petitioner of his right of appeal, although the district court saw fit to impose on petitioner an imprisonment of ten years, while of the other three participants in the alleged scheme, one was not even indicted and two were fined $1000 and $3000 respectively.

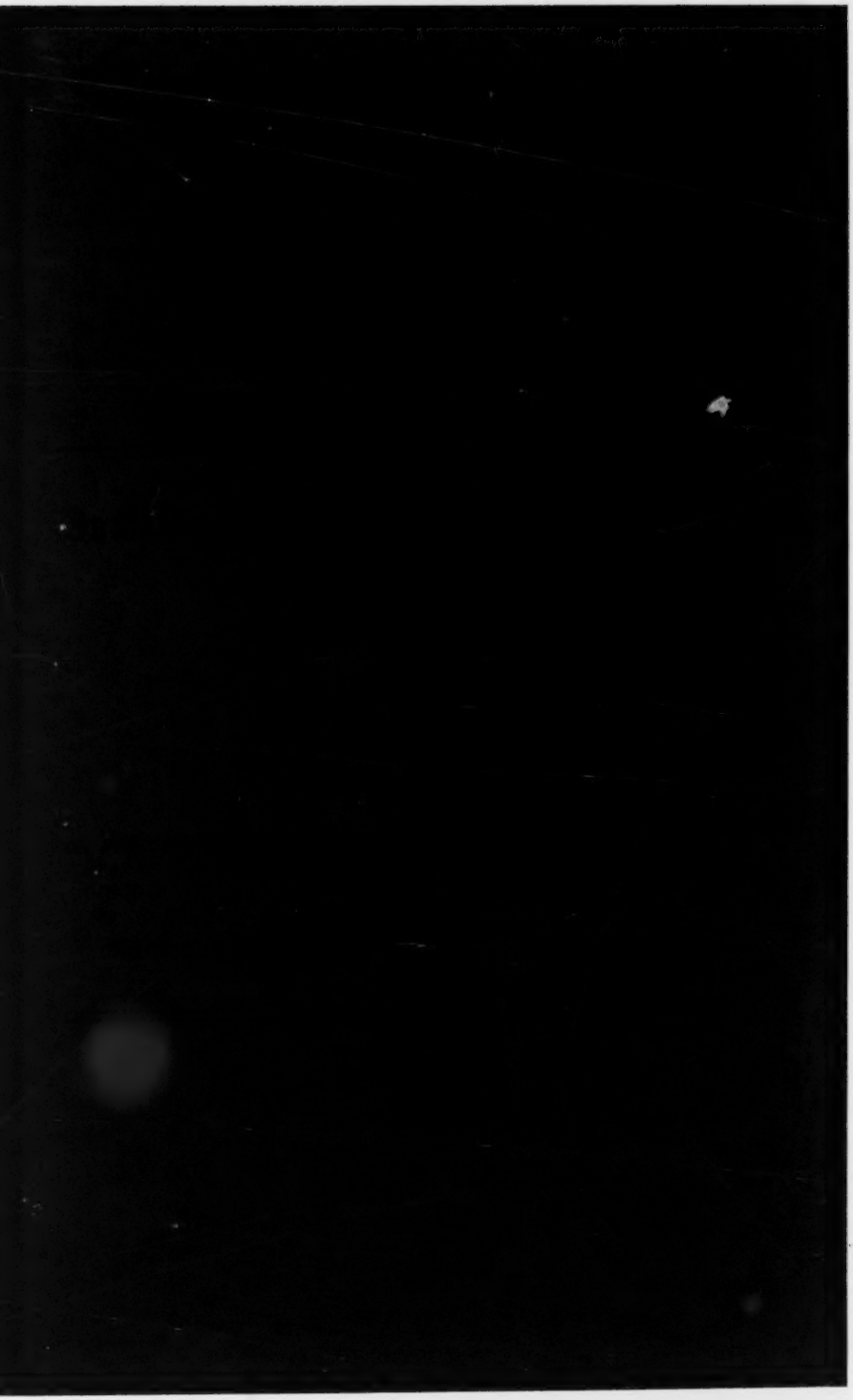
Conclusion.

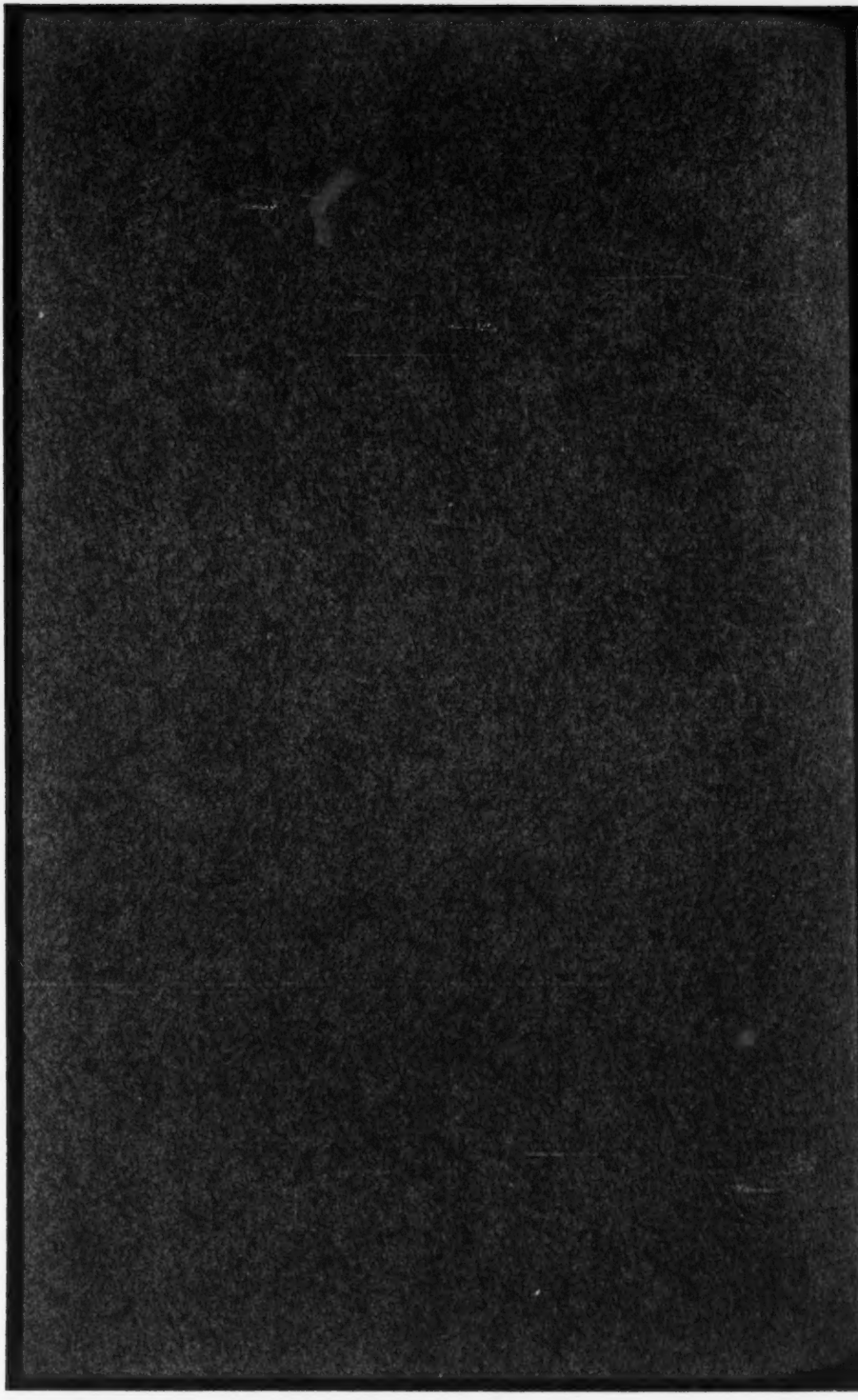
WHEREFORE, for the foregoing reasons, petitioner Richard W. Leche respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Circuit Court of Appeals may be reversed.

Respectfully submitted,

MARTIN W. LITTLETON, JR.,
Attorney for Petitioner.

(4876)





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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 169

RICHARD W. LECHE, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 1099–1101) is reported in 118 F. (2d) 246. The opinion of the District Court overruling the demurrer to the indictment (R. 35–50) is reported in 34 F. Supp. 982.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 13, 1941 (R. 1101); a petition for rehearing was denied May 9, 1941 (R. 1145). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI

of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court, by instructing the jury to disregard as surplusage an allegation in the indictment that the scheme to defraud involved a violation of the laws of the State of Louisiana, altered the indictment so fundamentally that it was error to submit the case to the jury; and whether the indictment, in the light of the instructions, charged a scheme to defraud.

2. Whether the evidence was sufficient to establish that the mailings alleged in the indictment were for the purpose of executing the scheme to defraud.

3. Whether the indictment, charging a general scheme to defraud, is rendered duplicitous by allegations particularly describing two transactions carried out as a part of the general scheme.

4. Whether petitioner was denied a fair trial by rulings restricting cross-examination of prosecution witnesses or by alleged misconduct of prosecuting attorneys.

STATUTE INVOLVED

The pertinent provisions of the Mail Fraud Statute (Criminal Code § 215; 18 U. S. C. § 338) are as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representa-

> tions, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States * * *, or shall knowingly cause to be delivered by mail according to the direction thereon, * * * any * * * letter * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner was convicted (R. 74) in the United States District Court for the Western District of Louisiana on all three counts of an indictment charging that petitioner, together with one L. P. Abernathy and one George B. Younger, made use of the United States mails in the execution of a scheme to defraud (R. 1–16). Abernathy and Younger entered pleas of guilty (R. 56). Petitioner proceeded to trial and upon conviction was sentenced to 5 years' imprisonment on the first count and 5 years on the second count, the sentences to run consecutively.[1] Imposition of sentence on the third count was suspended, and the de-

[1] At the conclusion of petitioner's trial, Abernathy was sentenced to pay a fine of $1,000 on Count 1. Imposition of sentence on the remaining counts was suspended and Abernathy was placed on probation for five years. Younger was sentenced to pay a fine of $1,000 on each of the three counts of the indictment (R. 68).

fendant placed on probation (R. 74–75). The Circuit Court of Appeals for the Fifth Circuit affirmed the conviction (R. 1101).

The case proved under the indictment may be summarized as follows:

In May 1936, petitioner became Governor of the State of Louisiana (R. 613). One James Thomas, a sales agent for various companies doing business with the State and with contractors working for the State (R. 430–433), contributed heavily to Leche's election campaign and also to the successful campaign for the passage of a State constitutional amendment appropriating $500,000 for the purchase of trucks and equipment for the Louisiana Highway Commission (R. 395–396, 470, 473). The defendant Abernathy, a close friend of Thomas, was appointed by petitioner as chairman of the Highway Commission (R. 94, 435–436, 674–678).

Sometime prior to August 1937, in the course of conversations between petitioner and Thomas regarding the purchase of trucks by the Highway Commission, Thomas informed petitioner that the defendant Younger, a dealer in International trucks, would be willing to pay a "commission" (R. 399). Petitioner told Abernathy not to make any purchase until he should instruct Abernathy on the matter (R. 673–674). Early in August 1937, petitioner, Abernathy, and Thomas met to discuss the number of trucks to be purchased and where the business should be placed (R. 398, 672, 685–686).

Petitioner instructed Abernathy to purchase 12 of the 150 trucks from one James Buie and the balance "through Mr. Thomas from the Younger Motor Truck Company" (R. 685–686). As they were leaving the office, Thomas asked petitioner what he should do with the commission he was to receive from Younger, and petitioner replied "I will tell you when you get it" (R. 399).

The 138 trucks were delivered to the Highway Commission over a period from September 27, 1937, through October 8, 1937 (Ex. G–17, R. 845–862). Under date of October 5, 1937, the Younger Motor Truck Company rendered an invoice to the Commission for the purchase price in the aggregate amount of $227,173.54 (Ex. G–16, R. 842–844). Upon instructions from Abernathy, after all of the trucks had been delivered, the State Highway Maintenance Engineer and the Highway Commission Purchasing Agent prepared a formal requisition and a purchase order, the necessary data being copied from Younger's invoice of October 5, 1937 (R. 161, 234–235, Ex. G–14 and G–15, R. 837–841). These officials, as well as other employees and members of the Highway Commission including two whose signatures appeared on the checks issued to the Younger Motor Truck Company, testified that they knew nothing of the merits of the purchase (R. 164, 217–218, 238, 242–244). The purchase had never been discussed at a Commission meeting nor had the Commission adopted any resolution authorizing the

purchase (R. 242, 245). Three Highway Commission checks totalling $227,173.54 were issued to the Younger Motor Truck Company on October 13, 1937. Younger endorsed them in the office of the Highway Commission auditor, who mailed them to Younger's bank. This mailing is the basis of Count 1 of the indictment (R. 9, 203–204, Ex. G–19, R. 865–870).

In July or August, 1938, petitioner Abernathy and Thomas met once more in Abernathy's office to discuss additional equipment requirements of the Highway Commission (R. 412–414), and Thomas thereafter transmitted to Younger an order for 95 more trucks. As on the earlier occasion, the requisition and purchase order were prepared after the trucks had been delivered and on the basis of an invoice presented by Younger (R. 162–163, Exs. G–25, G–26, and G–27, R. 879–884). In payment for the trucks the Highway Commission issued a warrant in the amount of $170,158.51 dated September 16, 1938, payable December 31, 1938, and bearing interest at the rate of 4 per cent (Ex. G–30, R. 953). Younger sold the warrant on the day he received it (R. 293–298). Due to a shortage of funds in the Highway Commission accounts the warrant was not, however, redeemed until January 26, 1939 (R. 208).

Excluding such items as freight and handling cost, the net amount paid by the Highway Commission to Younger for the 233 trucks was $385,152.54 (R. 127–128). The retail list price of these

trucks amounted to $352,306.25 (R. 152). Thus the Highway Commission paid $32,846.29 (9.32 per cent) more than the retail list price (R. 152–153). Younger's profit on the two transactions totalled $116,571.88, including $6,139.11 in State sales taxes collected from the Highway Commission, but not paid to the State [2] (R. 112, 119–120). There was testimony that it was the policy of the International Harvester Company, the manufacturer of the trucks, to sell to governmental units at dealer's discounts ranging from 10 to 35 per cent (R. 347). It was also testified that pursuant to a well understood company policy, dealers would allow to governmental units discounts from the retail list price ranging from 10 to 15 per cent (R. 348–349).

On October 13, 1937, when Younger received the Highway Commission checks for $227,173.54, he issued a check to James Thomas in the amount of $31,000 as "commission" on the sale (R. 116, 399, 400, Ex. G–35, R. 960). Similarly, on September 17, 1938, the day following the issuance of the $170,-158.51 Highway Commission warrant in payment for the 95 trucks, Younger issued to Thomas a sight draft for $22,000 as "commission" on the 1938 sale (R. 121, 400, Ex. G–43, R. 971). Thomas deposited these commissions in his own bank account, but testified that he held the $53,000 so

[2] Younger started payments in installments on the 1938 tax of $1,684.73 on August 21, 1939, after a State tax audit (R. 120).

received "as a trust" for petitioner (R. 495). Upon instructions from petitioner he included this amount in his own income tax returns (R. 402, 443, 444, 454, 455). Out of this $53,000 fund Thomas paid over to petitioner $31,000 in cash (R. 401–402). Thomas delivered the money in three installments, each wrapped in manila wrapping paper, to petitioner at his office in the Governor's mansion with no other person present (R. 416–417). The balance of the $53,000 was paid over by Thomas from time to time pursuant to instructions from petitioner, chiefly to political creditors of petitioner (R. 403–408, 502–505, 507–528, 533–536).

ARGUMENT

I

1. Petitioner contends (Pet. 11–20) that the trial court erred in submitting the case to the jury after instructing it to disregard, as surplusage, the allegation in the indictment that it was "a further part" of the scheme that the defendants would not comply with the Louisiana law requiring competitive bidding on State purchases of materials and supplies (R. 6, 767, 779–780). That action, in petitioner's view, removed from the jury's consideration an "essential element" of the scheme charged and subjected him to conviction for a crime not alleged in the indictment (Pet. 11–12, 14–15, 20).

However, the violation *vel non* of the Louisiana statute was in no sense an essential element of the

scheme charged. While the indictment alleged the scheme in great particularity (R. 1–8), in essence the crime charged was that, in violation of his official trust as Governor, petitioner, in connivance with Abernathy, the Chairman of the State Highway Commission, and Younger, a motor truck dealer, caused the Commission to buy a large number of trucks at excessive prices for the purpose of deriving an exorbitant profit which would be covertly shared by Younger, the dealer, petitioner, and his intermediary, Thomas. This scheme, as is apparent from the summary of the evidence at pp. 4–8, *supra,* was abundantly proved. Such a scheme, whether effectuated by failure to invite bids or otherwise, falls within the well-recognized category of frauds covered by the Mail Fraud Statute where one in a position of trust, public or private, derives a secret profit from his fiduciary relationship at the expense of those whom he is supposed to serve. *United States* v. *Buckner,* 108 F. (2d) 921, 926–927 (C. C. A. 2d), certiorari denied, 309 U. S. 669; *Shushan* v. *United States,* 117 F. (2d) 110, 115 (C. C. A. 5th), certiorari denied, May 12, 1941, Nos. 910–913, last Term.[3] Since, as is apparent from a reading of the indictment, the failure to comply with the competitive bidding statute was merely an incidental step in the scheme alleged, the action of the trial court in removing the

[3] For a more exhaustive exposition of the controlling theory see pages 14–16 of the Government's brief in opposition in the *Shushan* case, Nos. 910–913, last Term.

inapplicable state statute from the jury sideration was of no consequence.[4]

2. Petitioner further insists that the ourt by the instructions in question withdrew the jury the only two false representations d in the indictment (R. 7–8) because, he asit is apparent from the indictment that their was dependent upon a requirement under law that there be competitive bidding (P 19). Petitioner does not in terms argue false representations are an indispensable ment of a scheme to defraud (cf. *Shushan nited States, supra*), but relies upon the sup fact that this indictment was built upon the presentations in question. However, it is that the misrepresentations were but a min dent in the perpetration of the principal fr eged here.

Moreover, the trial court did not draw the allegations as to misrepresentations. sub stance of the misrepresentations charge that the defendants fraudulently asserted b ns of invoices the existence of an indebtedness than that which was legally due. It is only y of explanation that the indictment then hat a smaller sum was due "because it was app ately the amount that the manufacturers said

[4] The power of a court to instruct the jury egard immaterial allegations is unquestioned. *Ha nited States*, 112 F. (2d) 128 (C. C. A. 5th), cert enied, 311 U. S. 684, 722; cf. *Hall* v. *United States*, S. 632, 639.

trucks and equipment would have, without the interference of the said defendants, sold the motor-trucks and equipment to the Louisiana Highway Commission under legal and competitive bids and contracts" (R. 7). This allegation, that competitive bidding would have resulted in better prices for the State, was amply supported by evidence, unrelated to the Louisiana bidding laws (R. 344–349, 368–370, 382–386), which the trial court instructed the jury to consider in determining whether the trucks could have been purchased more cheaply "if an effort had been made" (R. 777).

3. Petitioner further asserts that the elimination of the Louisiana bidding statutes from the case leaves his conviction resting solely upon his failure to exercise "discretion" or "business prudence", relying in this connection upon isolated extracts from the opinion of the Circuit Court of Appeals and the trial court's charge to the jury. He argues that there can be no scheme to defraud without deceit (Pet. 12–15). The short answer to petitioner's contention is that his conviction did not rest upon any innocent failure to exercise business prudence. The trial court specifically charged that "deliberate purpose" and "guilty knowledge and participation" were required (R. 764), and that (R. 773):

> Carelessness alone, or inattention to business, would not be sufficient upon which to base a verdict of guilty, and you must be convinced beyond a reasonable doubt that he [petitioner] did so participate and did

> have such an interest in the matter as the Government contends. * * *

Petitioner was apparently satisfied with the fairness of these instructions, since he did not object to them or request any additional charge.

II

1. Petitioner contends (Pet. 20–21) that the letter and voucher checks set forth in count one (R. 9–12) were not mailed in the execution of the scheme to defraud. The letter in question was a letter from the Highway Commission Auditor to Younger's bank transmitting the three checks issued by the Commission in payment for the first auto trucks. The checks were credited to Younger's account by the bank (R. 201, 203–204, Exs. G. 18 and G. 19, R. 863–870, 876–877). It was from this account that Younger paid the "commissions" to Thomas, who in turn made distribution to petitioner and his nominees (R. 116, 399–408, Exs. G. 24, R. 877, G. 34, R. 959).

It is clear that the forwarding of the checks was an important step in the transmission of the fruits of the fraud to those who were to benefit therefrom. It is wholly immaterial whether the mailing of the checks was also, as petitioner insists (Pet. 20–21), in pursuance of some agreement which Younger had with his bank. The issue, viewed most favorably to petitioner, was one of fact upon which the jury found against petitioner under the instruc-

tions given at his request that "the mailed matter * * * must be a step in the attempted execution of the scheme" (R. 774, 776). *Green* v. *United States,* 93 F. (2d) 537, 539 (C. C. A. 10th).

2. Petitioner also contends (Pet. 21–24) that the mailing alleged in the second count of the indictment (R. 13–14) was not in furtherance of the scheme, because the scheme had then terminated. This mailing occurred in the clearance of the $22,000 sight draft drawn on the Guaranty Bank of Alexandria, which Younger gave Thomas as "commission" on the second truck deal. After Thomas deposited this draft in his account at the City National Bank of Baton Rouge (Exhibit G–44, R. 972) the bank forwarded the check for collection to the Commercial National Bank of Shreveport, which in turn mailed it to the Rapides Bank and Trust Company in Alexandria (R. 319, 322, 335–336). The last-named bank collected from the drawee bank by messenger (R. 315, 336).

As has already been noted, Thomas was the intermediary through whom a portion of the proceeds of the fraud was distributed to petitioner. It is plain that the clearance of the draft was intimately connected with the distribution of the fraudulent proceeds, and until that distribution was accomplished the scheme cannot be said to have terminated. *Tincher* v. *United States,* 11 F. (2d) 18, 21 (C. C. A. 4th), certiorari denied, 271 U. S. 664; cf. *McDonald* v. *United States,* 89 F. (2d) 128,

133–134 (C. C. A. 8th), certiorari denied, 301 U. S. 697.[5]

Moreover, the Louisiana Highway Commission (R. 2) was not finally defrauded until the $170,158.51 Highway Commission warrant issued in payment of the second group of trucks was redeemed and this amount charged against the Commission's bank account. *Hart* v. *United States, supra,* at page 131; Cf. *Meyer* v. *United States,* 220 Fed. 800, 804–805 (C. C. A. 9th). This did not occur until January 27, 1939, approximately four months after the mailing of the $22,000 draft (Exs. G–51 to G–56, R. 981–986).

3. Petitioner argues (Pet. 23–24) that the deposit of the $22,000 sight draft by Thomas in the City National Bank, which thereupon credited his account, relieved the defendants of responsibility for the subsequent mailing of the check for collection, because in collecting it the bank acted as "owner" rather than as agent for Thomas. But the issue in a mail fraud prosecution is whether the defendants "caused" the mails to be used, and any reasonably foreseeable use of the mails which results from the operation of the scheme is sufficient under the statute. *Hart* v. *United States,*

[5] *Mitchell* v. *United States,* 118 F. (2d) 653 (C. C. A. 10th), and *Dyhre* v. *Hudspeth,* 106 F. (2d) 286 (C. C. A. 10th), cited by petitioner to show a conflict of decisions (Pet. 11, 23), involved no question of division of proceeds, necessary to complete the scheme. The remaining cases cited at this point in the petition relate to sufficiency of proof of mailing, which is discussed at p. 15, *infra.*

supra, at page 131; *United States* v. *Weisman,* 83 F. (2d) 470, 473 (C. C. A. 2d), certiorari denied, 299 U. S. 560; *Shea* v. *United States,* 251 Fed. 440, 448 (C. C. A. 6th), certiorari denied, 248 U. S. 581. It is clear that a man of Thomas' business experience would reasonably anticipate that the deposit of an out-of-town draft would be likely to result in its clearance through the mails.

4. Petitioner asserts that there was no proof of mailing under the second count (Pet. 25). However, there was abundant testimony by the employees of both the sending and receiving banks that the uniform practice of the two banks was to transmit items such as the drafts set forth in counts two and three through the United States mails (R. 321–324, 328–329, 340–341). In addition, witnesses employed in the transit departments of the banks testified unequivocally that these items had been received and dispatched through the mails (R. 319, 335–338). This evidence was called to the attention of the jury in the District Court's charge (R. 768–772), and there can be no question of its sufficiency.[6] In none of the cases cited by petitioner (Pet. 25) was

[6] See *Greenbaum* v. *United States,* 80 F. (2d) 113, 124–125 (C. C. A. 9th); *McIntyre* v. *United States,* 49 F. (2d) 769 (C. C. A. 6th); *United States* v. *McCann,* 32 F. (2d) 540, 541 (C. C. A. 2d), certiorari denied 280 U. S. 559; *Cochran* v. *United States,* 41 F. (2d) 193, 205 (C. C. A. 8th); *Havener* v. *United States,* 49 F. (2d) 196, 200 (C. C. A. 10th), certiorari denied 284 U. S. 644.

there the volume of testimony of mailing found in the present case.

III

The indictment was not duplicitous. Petitioner's contention to the contrary (Pet. 26–28) is based on the allegations particularly describing the two truck deals effected by the defendants. But the indictment (R. 1–8) charges that these deals were carried out as part of a single general scheme to defraud, that each purchase of trucks was made from the same company, that each transaction involved the payment of similarly excessive prices by the Louisiana Highway Commission and distribution of spoils through the Younger Motor Truck Company, and that the profit from the two sales was treated as a single fund. It is well settled that such allegations charge a single scheme. *Sconyers* v. *United States,* 54 F. (2d) 68, 69 (C. C. A. 5th) *Van Riper* v. *United States,* 13 F. (2d) 961, 964 (C. C. A. 2d); *Stumbo* v. *United States,* 90 F. (2d) 828, 832 (C. C. A. 6th); certiorari denied 302 U. S. 755.

United States v. *Siebricht,* 59 F. (2d) 976 (C. C. A. 2d), relied on by petitioner (Pet. 11, 27), actually held that the indictment in that case charged a single scheme. The conviction was reversed, however, on the ground that the proof established two separate schemes, one of which was barred by the

statute of limitations.[7] In the instant case, the evidence fully supported the theory of the indictment that there was a single integrated scheme to defraud. It was proved that the parties to both transactions were the same; that the money to pay for the trucks came in both instances from a common source; that the method of operation was identical in both transactions. Indeed, when Thomas gave Younger the 1938 order he did not even give him a memorandum of specifications, as on the 1937 purchase, but simply told him "to just furnish so many trucks the same as previously" (R. 467). The pattern of the scheme had been established. Further transactions followed the pattern.

IV

1. Petitioner complains that it was improper to call the witness Hill to contradict certain testimony given by petitioner on cross-examination (Pet. 29–30). Petitioner had testified as to his participation with Hill in an oil and gas syndicate which paid petitioner, while Governor, $189,000,

[7] The holding that the evidence established two schemes seems hard to justify, and subsequent decisions of the Circuit Court of Appeals for the Second Circuit show that plurality of transactions does not mean plurality of schemes, given a nucleus of common participants, reasonable continuity, and similarity of objectives and methods of operation. *United States* v. *Manton*, 107 F. (2d) 834, 838 (C. C. A. 2d), certiorari denied 309 U. S. 664; *United States* v. *Graham*, 102 F. (2d) 436, 443–444 (C. C. A. 2d), certiorari denied 307 U. S. 643.

mostly in cash, in the course of three years (R. 622–632). Although petitioner claimed that these payments were for legitimate private business services, it appeared that he had made no investment in this enterprise and that his name was not shown on the company's books (R. 621, 649). Hill was called as a Government witness to explain the true nature of the payments to petitioner, but claimed his privilege against self-incrimination and did not testify (R. 689). The Government sought to establish through Hill evidence of "other similar transactions" bearing upon the issue of the fraudulent intent in the transactions charged in the indictment.[8] Accordingly, this was not a "collateral" matter, as petitioner urges, but a fundamental issue in the case and properly the subject of rebuttal testimony. *Scott* v. *United States*, 172 U. S. 343, 345–348; *Tam Shi Yan* v. *United States*, 224 Fed. 422, 423 (C. C. A. 2d); *Strom* v. *United States*, 12 F. (2d) 233, 234 (C. C. A. 6th), certiorari denied, 271 U. S. 683. Even if the subject matter were collateral, the admission of rebuttal testimony could hardly constitute reversible error, for the rule barring such contradiction rests on the policy against prolongation of trials by the injection of

[8] Although, as petitioner states (Pet. 29), the trial court ruled at the conclusion of the Government's case in chief that there was no similarity between the two transactions (R. 603–608), the record shows that he ultimately came to the view that the Hill arrangement was a similar transaction and therefore was material to the Government's case and subject to rebuttal (R. 689).

extraneous issues—a consideration which would seem to be properly left to the trial court's discretion. See *Hall* v. *United States,* 277 Fed. 19 (C. C. A. 8th); *Wharton,* Criminal Evidence, 11th Ed., Vol. III, Sec. 1354.

The prosecutor in closing argument should doubtless have made no reference to Hill's refusal to testify (R. 722). But petitioner did not object to these remarks when they were made and did not ask for any instruction requiring the jury to disregard them. Cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 238–239. Even where prosecutors have commented regarding a claim of privilege made by a defendant convictions have been sustained if the trial court took prompt remedial measures or, if no objection has been made, where guilt is clearly established. *Cross* v. *United States,* 68 F. (2d) 366 (C. C. A. 5th); *Nobile* v. *United States,* 284 Fed. 253, 255–256 (C. C. A. 3d).

2. Error is also urged (Pet. 30–32) because of the cross-examination of petitioner upon the assumption that a $14,030.90 item in his income-tax return was a gain, whereas it was actually a loss (R. 633–634). The incident was plainly unintentional and certainly not prejudicial. The prosecutor, having only a photostatic copy of the income tax return on which red ink loss figures could not be distinguished from black ink gain figures, assumed that the item was income.[9] And although

[9] Petitioner's assertion that Government counsel had the original return in his possession (Pet. 31) is contrary to fact.

the return and accompanying schedules were shown to the petitioner in the course of the examination (R. 633–634) and were available to his counsel, no one discovered the error until after the trial. The inquiry was directed simply to one figure among many others in petitioner's income-tax returns which the prosecutor was exploring in order to discover whether the returns reflected the income derived from the truck transactions. The prosecutor, assuming the item to represent income, was naturally surprised to have the taxpayer express ignorance of the source of such a large item, and, on the basis of the facts as he understood them, properly pointed to this circumstance as reflecting upon the credibility of the defendant.

3. There is clearly no error in the trial court's refusal to permit petitioner's counsel to cross-examine Thomas for the purpose of bringing out what petitioner had told Thomas that he intended to do with the "commission" on the truck deal. It would make no difference whether Leche intended to use this money for political or personal purposes.

Petitioner also finds "quite incomprehensible" (Pet. 34) the trial court's ruling restricting cross-examination of Government witness Abernathy to matters covered on direct examination (R. 682–683). It is plain, however, that this ruling but conforms to the well-established rule on this subject in the Federal courts. *Aplin* v. *United States*, 41 F. (2d) 495, 496 (C. C. A. 9); *Rose* v. *United States*,

45 F. (2d) 459, 465 (C. C. A. 8); *Feener* v. *United States,* 249 Fed. 425, 427 (C. C. A. 1).

4. Petitioner cannot show reversible error upon improper remarks of Government counsel in their summations to the jury (Pet. 35–36). In the first place, the record contains only a portion of the speech made by petitioner's counsel (R. 1083), but from that portion which does appear it may be assumed that the provocation was great.[10] The subsequent arguments of Government counsel are by no means models of temperate reasoning, but it is clear that much of the heat was generated by the attacks upon the prosecutors by defense counsel (R. 749–750, 1080). An appellate court will not reverse a conviction in the absence of a record of the defense argument, from which the extent of provocation for the prosecutor's remarks may be determined. *Vause* v. *United States,* 53 F. (2d) 346, 354 (C. C. A. 2d), certiorari denied, 284 U. S. 661; *Murphy* v. *United States,* 39 F. (2d) 412, 414 (C. C. A. 8th); *Hoffman* v. *United States,* 20 F. (2d) 328, 329 (C. C. A. 8th). Moreover, it is settled that where the evidence of guilt is strong and convincing, as in the instant case, argument of counsel, even if improper, will not be held to have

[10] The principal prosecution witness was characterized as an "evil bat" and "dirty package" (R. 1092), an attempt was made to provoke sectional prejudice by referring to the Assistant Attorney General who led the prosecution, as coming "down here from Chicago" (R. 1095; cf. R. 97, 113) and the Government's evidence was referred to as a "heap of rubbish" (R. 1089).

substantially prejudiced the defendant's rights. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239–240; *Berger* v. *United States*, 295 U. S. 78, 89.

CONCLUSION

The decision below is clearly correct, and there is neither conflict of decisions nor any question of general importance. We therefore respectfully submit that the petition for writ of certiorari should be denied.

CHARLES FAHY,
Acting Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
OSCAR A. PROVOST,
Special Assistant to the Attorney General.
LOUIS B. SCHWARTZ,
W. MARVIN SMITH,
Attorneys.

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IN THE

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October Term, 1941.

No. 169

RICHARD W. LECHE,

Petitioner,

versus

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITIONER'S REPLY BRIEF.

MARTIN W. LITTLETON, JR.,
Attorney for Petitioner.

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ADDITIONAL REASON FOR GRANTING WRIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Since the filing of the present petition and on June 12, 1941, the Circuit Court of Appeals for the Fifth Circuit, composed of Circuit Judges Foster, Sibley and Hutcheson, in *Stapp v. United States* (unreported), rendered a de-

cision in absolute conflict with the decision of that court, composed of Circuit Judges Sibley, Holmes and McCord in the instant case. As the *Stapp* case is unreported, we ask leave to quote rather extensively from its opinion by Foster, Circuit Judge.

> "The material facts may be briefly stated. There is no doubt defendants entered into a scheme to defraud Christian by falsely inducing him to believe that defendant Stapp was an agent of the Gulf Oil Corporation, authorized to buy an oil lease for that company from defendant Rudder for the price of $8000 and that Stapp could buy the lease for $4800. The proposal was made and accepted by Christian that he buy it from Rudder and in turn Stapp would buy it from him, for his principal, for $8000, the profit of $3200 to be divided between Christian and Stapp. The transaction was consummated at Pauls Valley National Bank, Pauls Valley, Oklahoma. Christian went there, taking with him a letter of credit issued by the Citizens Bank of Tyler, Texas, in the sum of $5000. He bought the lease, which subsequently proved to be valueless, and drew a check in favor of the Pauls Valley Bank on the Tyler bank, in the sum of $4800, for which the Pauls Valley bank issued its cashier's check to Rudder in payment for the lease. Rudder accepted the cashier's check, payable to himself, and the next day cashed that check with the Pauls Valley bank and received the money. Christian's check on the Tyler Bank and the letter of credit were then sent by the Pauls Valley bank by railway express to its correspondent, Liberty National Bank at Oklahoma City, Okla., which bank forwarded it to Fort Worth National Bank of Fort Worth, Texas, for collection. The Fort Worth bank, in the regular course of its business, mailed Christian's check and

letter of credit, with an accompanying collection letter, to the Tyler bank. The mailing of this letter by the Fort Worth Bank at Fort Worth, Texas, is the basis of the indictment."

The court upon these facts held:

"In this case it is apparent the purpose of the scheme to defraud Christian had been completely accomplished when the Pauls Valley Bank accepted his check on the Tyler bank and the money was paid to Rudder. Christian was then and there defrauded. Up to that point the mails had not been used at all. Christian could not have legally done anything to stop payment of his check and was obligated to reimburse the Pauls Valley Bank for cashing it. While the mails were incidentally used, the defendants had no interest whatever in that transaction. None of the banks involved, was their agent, innocent or otherwise. The mailing of the letter from Fort Worth to Tyler was not in furtherance of the scheme and was not 'caused' by them. The facts do not support the conviction. Spillers vs. U. S., 47 F. (2d) 893. Cf. Hart vs. U. S., supra."

The facts relating to the use of the mails made the basis of the indictment in the *Stapp* case are on all fours with the facts relating to the use of the mails made the basis of the second and third counts of the indictment against petitioner.

On September 15, 1938, the Younger Motor Truck Co. billed the Louisiana Highway Commission for $170,158.51 for 95 motor trucks delivered in the fall of 1938 (Ex. G-27, R. 883). On September 16, 1938, the Louisiana Highway

Commission issued its warrant due December 31, 1938, for $170,158.51 to the Younger Motor Truck Corporation in payment of said trucks (Ex. G-30, R. 953). On September 17, 1938, the Younger Motor Truck Co. sold the warrant to Newman, Harris & Co., receiving in payment therefor Newman, Harris & Co.'s check for $170,158.51 (Ex. G-32, R. 957). On September 19, 1938, Younger Motor Truck Company deposited Newman, Harris & Co.'s check with the Guaranty Bank and Trust Company of Alexandria, and on the same date the Guaranty Bank and Trust Company credited Younger Motor Truck Co.'s account with the amount of this check (Ex. G-37, R. 963). On September 17, 1938, the Younger Motor Truck Co. issued to James Thomas its draft drawn on the Guaranty Bank and Trust Co. for $22,000.00. This draft bore the notation "Commission on trucks" and represented payment of a commission on the sale of the 95 trucks (Ex. G-43, R. 971). All alleged payments by Thomas to petitioner were made prior to Thomas' receipt of this draft (R. 701). On September 17, 1938, Thomas unrestrictedly endorsed said draft and deposited it in the City National Bank at Baton Rouge, and on the same date the City National Bank credited Thomas' account with $22,000.00 (Ex. G-45, R. 973). The ledger sheet of the City National Bank of Baton Rouge under date of September 17, 1938, shows the credit to Thomas' account of this $22,000.00 and a charge on the same date of $10,020.03, $2,410.36, and $3.00, and that the account without the deposit of the $22,000.00 would have been insufficient to meet these charges (R. 973). The City National Bank of Baton Rouge thereupon forwarded this draft, with other checks, in a cash letter to the Commercial National Bank in Shreveport (R. 272-273,

Ex. G-66, R. 1005). The Commercial Bank in turn forwarded this draft, with other checks, in a cash letter to the Rapides Bank and Trust Company in Alexandria (R. 327-329, 335-336, 341). The Rapides Bank and Trust Company sent it by special messenger to the Guaranty Bank and Trust Company where it was cleared (R. 336). The delivery of the draft to the Rapides Bank and Trust Company is the basis of the charge in the second count of the indictment, that the defendants on September 20, 1938, knowingly caused the draft to be delivered by mail according to the directions thereon.

The undisputed evidence shows that the warrant of the Louisiana Highway Commission for $170,158.51 alleged to have been obtained by Younger Motor Truck Company in pursuance of a scheme to defraud was sold on September 17, 1938, by the Younger Motor Truck Company to Newman, Harris & Co. for $170,158.51. The liability of the Louisiana Highway Commission on the warrant was established and fixed the moment the warrant was sold to and purchased by Newman, Harris & Co. for its face amount.[1] The Louisiana Highway Commission was "then and there defrauded". It could not legally do anything to stop payment of its warrant and was obligated to reimburse Newman, Harris & Co. on its purchase. *Stapp v. United States, supra.* The purpose of the alleged scheme to defraud the Louisiana Highway Commission was com-

[1] It is elementary that the drawer of a check has no legal right to revoke his check, that is, stop payment after the instrument has passed into the hands of a bona fide holder for value. Universal Supply Co. v. Hildreth, 287 Mass. 538; Carhort v. Second National Bank, 98 N. J. L. 373; Gage Hotel Co. v. Union National Bank, 171 Ill. 551. Fraud relating to the consideration for which a check is given is never a defense in an action thereon by a bona fide holder for value in due course. Bridgeport Nat. Bank v. Blackman, 249 N. Y. 322.

pletely accomplished upon the receipt by Younger Motor Truck Company of $170,158.51 from Newman, Harris & Co. Up to that point the mails made the basis of the second and third counts had not been used. As it is vital to the commission of the offense that the letter be in furtherance of the scheme, use of the mails after the purpose of the scheme had been completely accomplished clearly could not be for the purpose of executing the scheme within the intent and meaning of Sec. 215.[2]

Moreover, the incidental use of the mails by the Commercial National Bank of Shreveport in forwarding the $22,000.00 draft to the Rapides Bank and Trust Company of Alexandria was not "caused" by the defendants. The legal effect of the City National Bank crediting Thomas' account with $22,000.00, the amount of the draft, was the ordinary transfer or sale of the draft by Thomas and the purchase of it by the City National Bank, and upon its delivery title to the draft passed and the City National Bank became the owner. *Burton v. United States*, 196 U. S. 283; *City of Douglas v. Federal Reserve Bank*, 271 U. S. 489; *Daykin v. Bayly*, 290 U. S. 143.

"It (City National Bank) was in no sense the agent of the defendant (Thomas) for the purpose of collecting the amount of the check from the trust company upon which it was drawn". *Burton v. United States, supra.* "The bank (City National Bank) would collect the item not as

[2] Stapp v. United States (supra); Mitchell v. United States, 118 F. (2d) 653; McNear v. United States, 65 F. (2d) 861; Dyhre v. Hudspeth, 106 F. (2d) 286; Armstrong v. United States, 65 F. (2d) 853; Little v. United States, 73 F. (2d) 861; Stewart v. United States, 119 Fed. 89; Merrill v. United States, 95 F. (2d) 669.

agent for the depositor (Thomas), but as owner." *Daykin v. Bayly, supra.* As none of the banks was the agent, "innocent or otherwise", of Thomas or the defendants, the incidental use of the mails by the banks was not "caused" by the defendants. *Stapp v. U. S., supra.* It is clear that the use of the mails made the basis of the second count was not in furtherance of the scheme to defraud charged to have been devised by the defendants and not "caused" by them. Furthermore, it must be remembered that the evidence establishes (R. 401-402-417, 701) that the last alleged payment by Thomas to petitioner was made "about a week or ten days after" Sept. 1, 1938. Therefore the collection of the $22,000.00 draft could in nowise be connected with the distribution of any funds to petitioner. The facts of the present case under the authority of *Stapp v. United States,* do not support the conviction.

The *Stapp* case and the present case present such a clear conflict in decisions rendered by the same circuit court composed of different judges within such a short space of time as to require the exercise of this Court's supervisory jurisdiction.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES.

I.

1. Government counsel argue (Brief 8-10) that the allegation in the indictment that it was a further part of the scheme that the defendants would fail and refuse

to comply with a penal statute of the state requiring competitive bids before purchasing the trucks, was in no sense "an essential element of" but "merely an incidental step in" the scheme alleged, because "in essence the crime charged was that, in violation of his official trust as Governor, petitioner derived a secret profit from his fiduciary relationship, and that such a scheme, "whether effectuated by failure to invite bids or otherwise", falls within the well-recognized category of frauds governed by the Mail Fraud Statute.

The short answer to this contention is that the indictment does not charge petitioner with violating "his official trust as Governor", or the defendants or any of them with deriving a secret profit from their "fiduciary relationship" or how "otherwise" than "by failure to invite bids" the scheme was to be effectuated. It is significant that in this connection government counsel fail to point out to this court wherein the indictment so charges. As a matter of fact the trucks in question were bought by the Louisiana Highway Commission, an independent corporation, of which petitioner was not even *ex officio* a member, nor chargeable with any duties in relation thereto.

The averment that the defendants failed and refused to comply with the state law requiring competitive bids and contracts is the sole averment contained in the indictment charging the defendants or any of them with violating any duty or trust in purchasing the trucks and the sole averment of fraud therein contained. Eliminating this allegation, the indictment is fatally defective (Pet. 15-18).

Moreover, the indictment from the time of its filing to the charge of the court was tried by the court, government and petitioner upon the theory that the state statute required the defendants to advertise for bids before purchasing the trucks and that defendants' failure and refusal to comply with this statute constituted the basis of the scheme to defraud therein charged. (Pet. 11.) It was only after it was conclusively established by the government's own witnesses that the trucks in question were purchased just as trucks had always been purchased by the Louisiana Highway Commission and in accord with its established custom, that the court, at the request of the government, instructed the jury to disregard the allegation in question as surplusage. The trial court clearly struck out a material part of the indictment, destroyed the entire pleading and ousted its jurisdiction, violating petitioner's rights under the Fifth Amendment to the Constitution of the United States. (*Ex Parte Bain,* 121 U. S. 1; *Thornhill vs. Alabama,* 310 U. S. 87, 96.)

2. Government counsel, in answer to petitioner's contention that the trial court by withdrawing the two and only two false representations set forth in the indictment, struck out a material part of the indictment, namely, the means of carrying out the fraud, and thus destroyed the indictment, argue (Brief 10-11) that petitioner "relies upon the supposed fact that this indictment was built upon the misrepresentations in question", but that "it is clear that the misrepresentations were but a minor incident in the perpetration of the principal fraud alleged here". This is a novel argument, almost, if not a complete confession of error. To argue that the two and only two false repre-

sentations set forth in an indictment are "but a minor incident" and that the trial court may instruct the jury to disregard them as surplusage would seem to indicate that the government is willing to cast aside all fundamental and basic law to sustain petitioner's conviction, for as stated by this Court, "And when the pretenses or representations or promises which execute the deception and fraud are false, they become the scheme or artifice which the statute denounces." *United States v. New South Farm & Home Co.*, 241 U. S. 64, 71. Moreover, it is settled law that to sustain an indictment charging a scheme to defraud by means of false representations, at least one of the false representations therein alleged must be proven (Pet. 19). That the present indictment charges a scheme to defraud by means of false representations (R. 2, 7-8), and that the withdrawal from the indictment of the two and only two misrepresentations charged destroyed the entire pleading, cannot be questioned.

Government counsel further argue (Brief 10-11) that "the trial court did not withdraw the allegations as to misrepresentations". The indictment in charging the false representations (R. 7-8) states what the representations were, alleges that the defendants knew them to be false and then alleges why they were false. A mere reading of the representations makes it clear that the grand jury based its finding that the representations were false upon its finding that the defendants failed and refused to comply with the law requiring competitive bids and contracts. Government counsel do not question this fact but contend that the averment alleging why the representations were false "is only by way of explanation", and, therefore, may

be withdrawn as surplusage without destroying the indictment. The answer to that contention is that the indictment must set forth the representations with proper averments and sufficiently negative their truth. "The averments must state what was pretended; and that what was pretended was false, and wherein and in what particular it was false."[3] The averment as to the falsity of the representations is not "by way of explanation" but a necessary negation of the truth of the representations. It is clear that the two and only two false representations charged were withdrawn from the indictment, when the trial court by its instructions withdrew the statute upon which they were based.

3. Government counsel argue (Brief 11-12) that petitioner "further asserts that the elimination of the Louisiana bidding statute from the case leaves his conviction resting solely upon his failure to exercise 'discretion' or 'business prudence', relying in this connection upon isolated extracts from the opinion of the Circuit Court of Appeals and the trial court's charge to the jury". The short answer to this contention is that petitioner does not rely upon "isolated extracts" but upon the trial court's charge to the jury, when it instructed them "to put that statute aside", and "not to consider it here", at which time it said:

> "Regardless of that (the statute), there still remains the duty upon everyone connected with the matter to exercise discretion." (R. 767.)

[3] United States v. Watkins, 28 Fed. Cas. 419; Haas v. United States, 93 F. (2d) 427; United States v. New South Farm and Home Company, 241 U. S. 64, 68, 71.

Upon review, the Circuit Court of Appeals found:

> "The district court instructed the jury that it was doubtful whether the state law required the defendants to advertise for bids, and to disregard that question, since, without the statute, there still remained the duty to exercise business prudence. We think the court committed no error in this respect, because the averment as to the requirement under the state law was wholly immaterial and unnecessary."

The above quotation is not an "isolated extract" but everything that the opinion of the Court of Appeals sets forth with reference to the point in question, and the language used shows clearly and affirmatively that the Appellate Court merely substituted its "Business Prudence" for the trial court's "Discretion".

It is evident that the Circuit Court of Appeals approved the action of the trial court in instructing the jury to disregard the question whether the state law required the defendants to advertise for bids solely upon the ground that "without the statute there still remained the duty to exercise business prudence".

Government counsel then state that petitioner "argues that there can be no scheme to defraud without deceit (Pet. 12-15)". It cannot be that counsel question such a fundamental principle. Of course there can be no "scheme to defraud" without "fraud", and as there can be no "fraud" without "deceit", it naturally follows that there can be no "scheme to defraud" without "deceit".

Government counsel then state that "the short answer to petitioner's contention is that his conviction did not

rest upon any innocent failure to exercise business prudence". Government counsel thus concede that petitioner's conviction rests upon some form of "failure to exercise business prudence" but not upon "any innocent failure to exercise business prudence". It would seem that government counsel are unable even at this time to point out to this Court the specific charge upon which petitioner's conviction rests. We appreciate their difficulty. The trial court's charge left each juror free to frame his own scheme, to choose his own means, and to find petitioner guilty for any rhyme or reason without regard to the indictment found by the grand jury.

Where the prosecution obtains an indictment which charges the violation of a specific penal statute, and afterwards, on the trial of the defendant under said indictment, the prosecution requests the court to charge, and the court so charges, that the alleged violation of said statute is surplusage, a conviction so obtained cannot stand.

This would open the door to the prosecution for the use of a penal statute simply as a means of inducing a grand jury to return an indictment, and then, later, on the trial of the defendant under the indictment so obtained, abandoning the alleged violation of the statute as being of no further use.

No court can permit the opening of such a door. Other things may be surplusages but specific penal laws, specifically charged in an indictment, can never be surplusage. The reason for this is obvious. No better example could be found than the instant case.

Petitioner was Governor of the State. He had taken an oath to uphold the laws of the State. This is a matter of common knowledge. It might well have been the alleged violation of the state statute requiring bids, one of the very laws petitioner had taken the oath to uphold, which induced a grand jury, composed of laymen, to return this indictment. Had the grand jurors been advised "But in any event you may put that statute aside. You are not to consider it here", (R. 767), and, "You should disregard that as surplusage", (R. 780), there may probably have been no indictment in the first place. The alleged violation of the statute having served its purpose, cannot, in the closing moments of the trial, be cast aside as surplusage, and petitioner tried on a charge not made without violating his rights under the Fifth Amendment to the Constitution.

It is clear that petition, indicated for using the mails in furtherance of a scheme to defraud, was tried upon and convicted of a charge other than that alleged in the indictment, namely, failure to exercise "discretion", and that the Circuit Court of Appeals, to affirm the judgment of conviction, was forced to hold that failure to exercise "business prudence"—"discretion" re-edited—constituted a scheme to defraud within the purview of the Mail Fraud Statute.

It is respectfully submitted that the government's brief utterly fails to answer the questions raised with regard to the violation of petitioner's constitutional rights (Pet. 11-20) resulting from the destruction of the indictment as found by the grand jury and his trial on a "charge not made".

II.

The Government's brief (Brief 16-17), concerning the plea of duplicity, states, "In the instant case, the evidence fully supported the theory of the indictment that there was a single integrated scheme to defraud". The evidence is directly to the contrary. Government witness Thomas, the only witness who testified as to the alleged second meeting a year later relative to the second purchase of trucks (R. 412-413) said:

> "Q. That was a separate new transaction?
> "A. Yes.
> "Q. And had no connection with the previous transaction of 138 trucks, did it?
> "A. No.
> "Q. It was separate and distinct?
> "A. That's right."

What could be more positive than this testimony? The Government (Brief 17) relies solely on the statement by Thomas (R. 467) that when he gave Younger the 1938 order he told him "to just furnish so many trucks the same as previously". This is a stock phrase in business circles. "Same as previously" is often used in ordering goods from a concern that has furnished them in the past. It had nothing to do with the transaction other than to specify the type of equipment.

But when Thomas was asked the direct question "And had no connection with the previous transaction of 138 trucks, did it?", his answer was "No". This evidence certainly does not "fully support the theory of the indictment".

When Thomas was asked (R. 413) relative to the second meeting, a year later, "What was discussed then at that meeting?", he answered "Additional equipment needed by the Maintenance Department". This testimony does not show any "single integrated scheme to defraud". It shows the contrary.

A most significant occurrence, with respect to the evidence of duplicity, is the testimony of Abernathy. Abernathy (Pet. 34-35), although an alleged accomplice with (R. 687-688) the expectation of leniency, was not used by the Government on its direct case but was called by the Government in rebuttal. Thomas preceded Abernathy on the witness stand and had testified positively (R 412-413) that the two purchases of trucks, a year apart, were separate and distinct transactions with no connection between them. Yet the Government did not ask Abernathy one single solitary question about the second transaction in 1938, although he was in a position to so testify and to tell whether or not it was in any way connected with the 1937 purchase of trucks. But this is not all. When petitioner's counsel attempted to question Abernathy as to the second transaction in 1938, Government Counsel (R. 682) objected "for the reason that he was not questioned about the 1938 deal. He is restricted to the direct meeting in 1937 in August", and was sustained (R. 682) by the Court. Thus the Government not only failed to attempt to prove by its own witness "the theory of the indictment that there was a single integrated scheme to defraud", but actually, by objection sustained by the Court, prevented petitioner from cross examining him on this point. And this in view of the previous posi-

tive testimony (R. 412-413) of Thomas that there was no connection between the two transactions, and in further view of the fact that Abernathy was improperly (Pet. 34-35) called in rebuttal. The evidence of duplicity, out of the mouths of the Government's own witnesses, is undeniable.

III.

The brief for the United States submitted herein utterly fails to answer any of the points raised in the petition for writ of certiorari. Government counsel, however, contend that petitioner's contention that he did not receive a fair and impartial trial because of misconduct of the prosecutor should not be considered by this Court, because "the evidence of guilt is strong and convincing".

In submitting his petition to this Court, petitioner purposely omitted all discussion of evidence except as to the use of the mails made the basis of the different counts of the indictment. This was done for two reasons: (1) the questions raised were purely questions of law, and (2) the trial court's action in striking out the scheme actually alleged and in submitting the case to the jury on "a charge not made" rendered any proper or orderly discussion of the evidence, that is, with respect to the offense actually alleged, impossible. However, the brief of the government devotes almost its entire "Statement" to its summary of the evidence (Brief 4-8). Government counsel contend that "in essence the crime charged was that, in violation of his official trust as Governor, petitioner, in connivance with Abernathy, the Chairman of the State Highway Commission, and Younger, a motor truck dealer, caused

the Commission to buy a large number of trucks at excessive prices for the purpose of deriving an exorbitant profit which would be covertly shared by Younger, the dealer, petitioner, and his alleged intermediary, Thomas, that this scheme "was abundantly proved" (Brief 9) and that "the evidence of guilt is strong and convincing".

Even accepting the government's version of the crime charged, although the indictment as hereinbefore pointed out fails to support this version, an examination of the record establishes that it is barren of any substantial evidence showing any participation by petitioner in this or any other scheme to defraud the Louisiana Highway Commission in the purchase of the trucks in question or any knowledge on his part that any such scheme existed between other persons.

According to the government there were four participants to the alleged scheme, petitioner, Abernathy, Younger, and Thomas (not indicted). At the opening of the trial Abernathy and Younger withdrew their pleas of not guilty and entered pleas of guilty, imposition of sentence being deferred until after petitioner's trial. It is thus evident that the case of the government did not depend upon circumstantial evidence or present difficulty of proof. The government had it within its power to prove by direct evidence, that is, by the testimony of Abernathy, Younger and Thomas, concededly parties to the alleged schemes, petitioner's participation in any scheme to defraud that may have existed. Yet Thomas alone was called on its direct case, Abernathy only in rebuttal, and then the government by objection (R. 682)

limited his cross examination to matters covered on direct examination. Younger was not even put on the witness stand. In *Crawford vs. U. S.*, 212 U. S. 183, where the defendant was similarly situated, this Court said "The defendant was peculiarly situated in this case, and great care was necessary to prevent injustice to him." Such care was totally lacking in the instant case.

An examination of the record fails to disclose a scintilla of evidence showing petitioner's violation of any official trust as Governor. As a matter of fact petitioner as Governor was not chargeable with any duty or trust in purchasing the trucks. The trucks were bought by the Louisiana Highway Commission, an independent corporation, of which petitioner, as Governor, was not even *ex-officio* a member. Moreover there is not a scintilla of evidence in the record showing any connivance between petitioner, Abernathy, or Younger, in the purchase of the trucks. Abernathy, called as a witness in rebuttal and available to the government on its direct case, could have testified to the existence of any such connivance but gave no such testimony. Younger and Thomas could have done the same but Younger was not called and Thomas, as the government's principal witness, testified to the contrary, he said (R. 485) "I have never thought there was anything wrong in this truck deal".

Moreover, witnesses called by the government established that the trucks in question were purchased just as trucks had always been purchased by the Louisiana Highway Commission (R. 157, 158, 159, 168, 246, 257, 260) for a period of over 10 years and that such purchases

were in accord with the established custom of the Highway Commission. In addition thereto the trial court instructed the jury (R. 767, 779, 780) that the purchase of the trucks in question violated no state law. Therefore neither custom or law was violated.

The record further shows (R. 466) that the prices paid for the trucks were obtained by Abernathy from the International Harvester Company.

The record further shows that petitioner did not recommend (R. 398, 686) the make or number of trucks to be bought; that he knew nothing (R. 411) about truck prices; that he never at any time (R. 411, 413, 414) discussed prices or terms of sale with either Thomas or Abernathy, and that he did not even know (R. 615, 647, 674) Younger.

Although government contend that the trucks in question were sold pursuant to the scheme at excessive prices to the Louisiana Highway Commission, it is significant that neither Thomas nor Abernathy were asked a single solitary question in reference to any such agreement between any of the alleged participants to the scheme, and of course, Younger was not even called. It is further significant that Abernathy was not even asked about the price paid for the trucks, although Thomas (R. 466) had previously testified that when Abernathy gave him the prices Abernathy had told him that he had obtained them from a representative of the International Harvester Company.

The schemes charged are alleged to have been confected at two meetings between Abernathy, Thomas and

petitioner held in 1937 and in 1938. Yet the testimony of government witnesses, Abernathy and Thomas, is utterly barren of any evidence in any way connecting petitioner with any fraudulent scheme. Thomas testified (R. 398) that at the first meeting there was a general discussion of the kind of equipment to be used and that Abernathy had a list of the equipment requested by his men and that petitioner told Abernathy to buy what he, Abernathy, recommended and where to place the business. He also testified (R. 411) that no prices or terms of sale were discussed and that petitioner knew nothing about truck prices. Abernathy testified (R. 686) that he recommended Internationals, and that all that was discussed (R. 685) at the meeting was the quantity to be bought and where to place the business. He said (R. 673) that the Governor had instructed him to make no purchases until he had conferred with him and instructed him what do do, but petitioner (R. 655) emphatically denied this. It is further significant that petitioner (R. 615, 647) had never heard of Younger, that Abernathy (R. 674) admitted that petitioner did not know Younger but that Younger was an International dealer and that Abernathy (R. 686) recommended International trucks.

As to the second meeting in 1938, Thomas (R. 413, 414) testified that the only thing discussed was additional equipment needed by the Commission and that petitioner did not discuss prices and did not know what was going to be paid for the trucks. As the prices paid for the trucks are the crux of the matter this direct and uncontradicted testimony by the government's principal witness that petitioner did not know what price the Highway Commis-

sion was going to pay for them clearly entitled petitioner to a directed verdict. Further than this, although Abernathy was improperly called in rebuttal, he was not examined on direct as to the second meeting in 1938 and his cross examination (R. 682) on this important matter was curtailed by objections sustained by the Court. Thomas testified (R. 485) that he "never thought there was anything wrong in this truck deal", and he further testified (R. 485) that he thought "Abernathy used reasonable precaution to buy trucks at the right price".

Thus, although it had within its power to prove by the direct evidence of the parties themselves the alleged fraudulent scheme, the Government failed completely to prove its case. Petitioner (R. 614) denied both the above meetings. However, if both of said meetings had been held and had there taken place at said meetings just what Abernathy and Thomas testified to, nothing is proved beyond what takes place every day between any Governor and his various department heads, namely, a discussion of the needs of the department and the recommendation and suggestion of those interested in its welfare.

The statement of Thomas that he paid petitioner the sum of $31,000.00 stands absolutely alone, being uncorroborated and unconfirmed by the testimony of any other witness, any document or any circumstance and, in addition to this, is rendered most improbable by Thomas' own testimony and certain inescapable facts contained in the record, besides the positive and unequivocable denial of petitioner (R. 613, 614).

The two commissions received by Thomas in 1937 and a year later in 1938, were lumped together by the Government and this "$53,000" was referred to continually by Government counsel throughout the testimony of Thomas (R. 374-499). The reason for this is obvious.

In the first place, Thomas testified (R. 401) that the payment of $31,000 to petitioner was made in three payments, the sum of $12,000 being paid to petitioner on September 1, 1938, a payment of $16,000 about a week before September 1, and a payment of $3,000 about a week after September 1. The payment of $12,000 (R. 401) Thomas fixes by a check in that amount (G-2) payable to cash, which Thomas himself cashed and which bears no notation of any kind whatsoever relative to petitioner. This $12,000 cash check of Thomas' was seized upon as fixing the dates of the alleged payments to petitioner. It must be noted here that the alleged three payments (R. 402) made within the period of two weeks and totalling $31,000 were made one year after the $31,000 check was received by Thomas from Younger as his commission on the 1937 truck sale, and several weeks before the receipt by Thomas of the $22,000 check received by him from Younger as his commission on the 1938 sale.

Thomas' statement (R. 401) that he paid the $31,000 "out of the $53,000" is proven to be absolutely false, since he did not receive his second commission of $22,000 until September 17, 1938, two weeks after he allegedly made the payments to petitioner. Moreover, Thomas, according to his own testimony, did not pay petitioner anything until nearly one year had elapsed, October 13, 1937,

to September 1, 1938, since he himself had received his first commission of $31,000 from Younger. The record shows (R. 966, Exhibit G-38) that Thomas' bank account in which he had deposited the $31,000 in 1937, was overdrawn on July 6, 1938, two months before any alleged payment to petitioner. Therefore, having spent the $31,000 he received in 1937 and having not yet received the $22,000 in 1938, his statement that he paid petitioner "out of the $53,000" is absolutely contradicted by the facts.

Thomas testified (R. 415) that the payments by him to petitioner were made in cash and that no one else was present at the time. Neither did he definitely fix any time of payment. The record shows (R. 402) that Thomas returned and paid income tax on both the $31,000 in 1937 and the $22,000 in 1938, and when confronted with this documentary evidence, what could he do but say it was done upon petitioner's instructions.

The $31,000 having been deposited by Thomas in his bank account and commingled (R. 456) with his other funds and spent by him before making any of the alleged payments to petitioner, he was again compelled to testify that he kept this sum "as a side issue", "more as a trust" for petitioner, and that "I treated it differently by keeping in the back of my mind that it was separate" (R. 495).

Thomas made a weak and unsupported attempt to show that the $53,000 was kept as a trust for petitioner, but the whole transaction, according to Thomas' own testimony, was mental, and he testified (R. 495) that he did not have any discussion with petitioner at the time the

last $3,000 was paid, and after he had paid the $12,000, relative to any balance remaining in the "trust". He said,

> "I don't recall any particular discussion of it. I can't recall any conversation on that subject."

And when asked,

> "At any of these three meetings with Leche at which you made the payments to him of the sixteen, twelve and three, did you at any time tell him how much money you had paid out of that amount, or how much you had left in that $53,000?"

he answered,

> "No, I don't think I did."

It certainly appears that the "trust" idea was dissolved by Thomas' own testimony. It is also significant that in December, 1939, long before the trial of this case (R. 908), Thomas repaid the entire $53,000 to the Louisiana Highway Commission.

When petitioner attempted (R. 417) to cross examine Thomas as to the alleged payment by Thomas to him of $31,000 government counsel objected and was sustained by the court (R. 417) on the ground that "it wouldn't make any difference if it was gotten from the state what he did with it". Thus petitioner was prevented from cross examining the only witness who testified that petitioner received any money and this cross examination related to that important matter itself. In the first place the question did not relate to "what petitioner did with it", the question propounded to Thomas (R. 417) was "what was the occasion for making these payments to him?" clearly a

legitimate and necessary question on cross examination of the sole witness who had testified on direct that he had given petitioner any money. Thomas was a government witness, and although admittedly a party to the alleged scheme, had been granted immunity. He could easily have answered " I gave him the money pursuant to the scheme to defraud", or "the money I gave him was his part of the deal". But government counsel objected and was sustained because "it wouldn't make any difference if it was gotten from the state what he did with it". Whether the money came from the state was clearly a question of fact to be found by the Jury. It was more than this, it was one of the most vital issues in the trial. The trial court not only usurped the functions of the Jury in finding this fact, but actually made it the basis of his ruling in sustaining the objection. Now if petitioner had been on the stand, had admitted receiving the money and then sought to justify his action by testifying what he did with it, an objection sustained because "if the money came from the state it wouldn't make any difference what he did with it", might have had some merit. But such was not the case. Petitioner (R. 613, 614) strenuously denied receiving any money and Thomas' unconfirmed and uncorroborated testimony is the sole testimony in the record to this effect. Petitioner was entitled to cross examine Thomas on this point whatever the grounds for objection might have been, but to sustain such an objection by assuming such a vital fact, clearly a matter for Jury determination, is unquestionably reversible error.

The record being barren of any testimony connecting petitioner with any scheme to defraud which might have

existed, Government counsel seek to convince this Court that petitioner must be guilty because of his participation in similar transactions. The transaction in question relates to petitioner's interest in a legitimate contract for the sale of gas. This was purely a business transaction (R. 665) totally unconnected with the State or the United States in any way except that the State collected its severance tax on gas that was otherwise being wasted. Petitioner (R. 653) was obligated to pay his pro-rata in securing leases and drilling wells. However, (R. 654) it developed that the syndicate was able to purchase gas which was being wasted, thus, transforming a public liability into a public asset and, therefore, the necessary investment in securing leases and drilling wells was obviated. There was nothing wrong or even unethical (R. 665) in this transaction. No political favors were granted or political pressure exerted (R. 665) in regard to this transaction, but, on the contrary, petitioner (R.666) sponsored legislation that cost the gas interests over half a million dollars per year in additional taxes. There is no similarity whatsoever between this transaction and the case at bar and if the Government's contention was correct the only evidence necessary to convict one of any crime would be his participation in a legitimate business transaction.

The testimony of the Government's principal witness, Thomas, (R. 411) that petitioner never discussed the terms of sale, that he knew nothing about truck prices, that he never discussed prices or terms of sale at any time and (R. 413-414) that petitioner did not know what price was going to be paid for the trucks in question, pierces the

vitals of the Government's contention and is, alone, sufficient proof of petitioner's innocence. It absolutely destroys any "intent" on the part of petitioner, a vital element in this crime.

Furthermore Thomas was not even indicted, while Younger and Abernathy were merely fined in the sums of $3,000 and $1,000, respectively. Even with the immunity given Thomas and the leniency shown Younger and Abernathy, the government not only failed to make out a case against petitioner, but the record shows affirmatively that petitioner was not a party to any fraudulent scheme.

For a fuller discussion of the facts, we respectfully refer the Court to Pages 1126-1144 of the Record, the other contentions of the government being fully answered in the petition for a writ of certiorari.

CONCLUSION.

Counsel respectfully submits that the petition herein presents such fundamental questions of law involving the constitutional rights of the petitioner, which are unanswerable by the Government, that petitioner is clearly entitled to a review of this important matter by this Court and it is respectfully prayed that the writ asked for be granted.

Respectfully submitted,

MARTIN W. LITTLETON, JR.,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 169

RICHARD W. LEOPOLD,

vs.

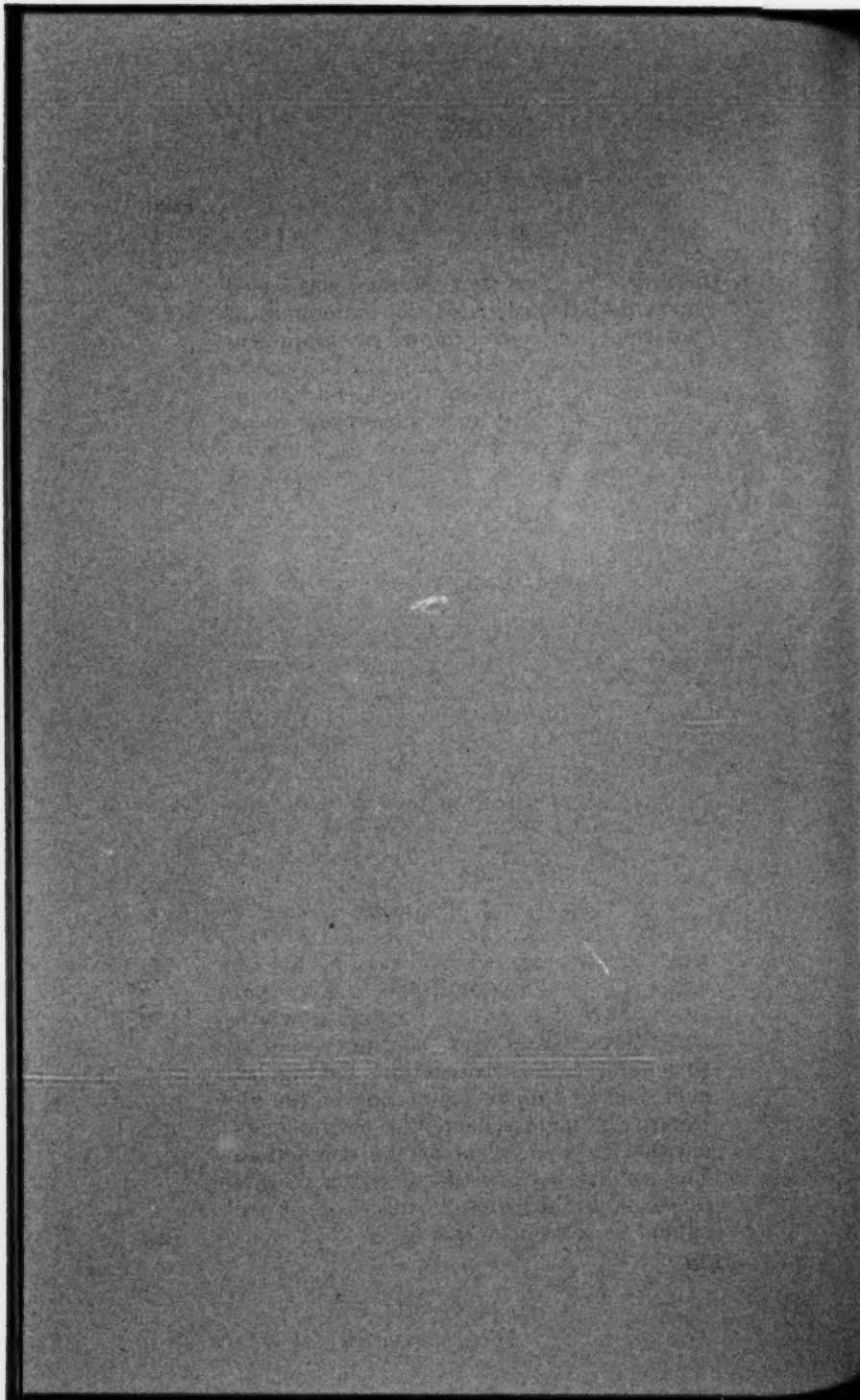
THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF PETITION FOR CERTIORARI.

William W. Lancaster, Jr.,

Owen C. Scarborough,

Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 169

RICHARD W. LECHE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF PETITION FOR CERTIORARI.

Comes now the above-named Richard W. Leche and presents this, his petition for rehearing of his petition for certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, which petition was denied on October 13, 1941.

The petitioner heretofore filed his petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered March 13, 1941, affirming a judgment of conviction for using the mails in furtherance of an alleged scheme to defraud.

Petitioner verily believes that there are certain grounds of review which have not heretofore been presented to this Court.

Petitioner believes that the Circuit Court of Appeals has sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision and, as further appears, has decided an important question of Federal law, which has not been, but should be, settled by this Court.

In view of his belief in his own innocence and the severity of the sentence, petitioner respectfully asks the court to give renewed consideration to the petition for certiorari and grant petitioner merely the right to fully argue and present his case to this Court. More especially does he respectfully pray for such consideration in view of the fact that his conviction was based upon an issue of fact between one sole witness, Thomas, and petitioner. Thomas, who was granted immunity, testified to paying $31,000 cash to your petitioner, which petitioner (R. 613, 614) on the witness stand sharply denied, Thomas' testimony on this issue being wholly without corroboration, documentary or otherwise. Thomas also (R. 484) repaid the entire $53,000 to the Highway Commission before trial of this case.

In view of the fact that pleas of guilty to the indictment were entered by the other two co-defendants, who were merely fined (R. 68), and in view of the fact that the aforesaid witness, Thomas (R. 1-16), was not even indicted, the rule in the case of *Crawford* v. *United States*, 212 U. S. 183, 204, becomes particularly applicable, that in cases like this the greatest care should be taken to prevent injustice, especially in view of the fact that a "tremendous political upheaval took place in the State" (R. 179).

A reading of the record herein impresses one with the fact that the situation before the Court here was similar to that in *Frank* v. *Mangum*, 237 U. S. 309, where Justice Holmes said (p. 349):

> "Any judge who has sat with juries knows that, in spite of forms, they are extremely likely to be impregnated by the environing atmosphere."

The record herein presents a total lack of judicial atmosphere, evidenced, for example, by the fact that three prosecutors summed up for the Government, whose summing up were appeals to prejudice and passion and not to the calm judgment of a local jury (R. 733, 735, 736, 738, 739).

Summary of Argument.

I. In view of the fact that the trial was based upon the allegations of the indictment of non-compliance with the wholly inapplicable Louisiana statutes in regard to public bidding, the rule permitting a court to instruct a jury that such allegations in an indictment may be treated as surplusage is not applicable. The prejudice to the petitioner cannot be eradicated by a mere instruction to disregard such allegations.

II. Cross-examination of petitioner as to private business transactions in which he made personal profits and the subsequent examination of the witness Hill, who refused to answer on the ground of self-incrimination and the reference to this subject in the summing up by the prosecution and the charge of the Judge on this subject, were so prejudicial as to render the trial wholly unfair; the mere fact that no objection was taken to said cross-examination is immaterial.

III. Under the authority of *Stapp* v. *United States*, 120 F. (2d) 898, decided by the Circuit Court of Appeals for the Fifth Circuit, after the decision in this case by that same court, the use of the mails, which constitutes the alleged mailing essential to a mail fraud prosecution, having occurred after the consummation of the alleged fraudu-

lent scheme, the petitioner is entitled to a reversal of the conviction. The conflict between the decision in this case and the decision in the *Stapp* case should be settled by this Court.

IV. The draft of $22,000 in favor of Thomas, drawn by the Younger Motor Truck Corporation, representing a part of the profits under the alleged scheme to defraud, having been deposited in the City National Bank of Baton Rouge, and thereafter sent by that bank to a third bank and then allegedly mailed by this third bank to still another bank, not named in the draft, such incidental use of the mails is not "caused" by the defendant nor "according to the direction thereon" and does not come within the mail fraud statute.

I.

In view of the fact that the trial was based upon the allegations of the indictment of non-compliance with the wholly inapplicable Louisiana Statutes in regard to public bidding, the rule permitting a court to instruct a jury that such allegations in an indictment may be treated as surplusage is not applicable. The prejudice to the petitioner cannot be eradicated by a mere instruction to disregard such allegations.

The indictment herein contained allegations that a part of the scheme was that the defendants failed and refused to comply with the law of the State of Louisiana requiring all political subdivisions of the State to advertise for bids before the purchase of materials and supplies in excess of $500. In fact, the only duty charged to petitioner and the only two false representations alleged in the indictment are founded squarely upon the alleged violation of this penal statute. The District Court instructed the jury that "this particular statute", "apparently relied

upon" (R. 767), was questionable and to "put that statute aside", and "not consider it here", and (R. 780) "although there is mention of it in the indictment", "you should disregard that as surplusage."

The Circuit Court of Appeals ruled that there was no error committed by the trial court in eliminating consideration of the statute, because the averment as to the requirement under the State law was wholly immaterial and unnecessary.

Assuming the allegation of non-compliance with the said State law was unnecessary, petitioner now alleges that an examination of the record reveals that its elimination from consideration of the jury did not take place until the court charged the jury (R. 761).

That the indictment was based largely upon alleged non-compliance with the Louisiana statute and the trial based largely upon such non-compliance, becomes evident from an examination of the opinion overruling the demurrer (R. 48), the statement of the court as to its understanding of the contention of the Government as made in the indictment and in its opening statement (R. 172), the statement of the prosecutor (R. 173), and the statements of the Government's counsel in summation, commenting on petitioner's failure to do his public duty and advertise for bids (R. 700, 702, 703).

Furthermore, when the witness Thomas was called to the stand (R. 394), the prosecution read the Louisiana General Statute concerning public bidding on contracts of purchase in connection with public works. This was objected to by counsel for the defense and then all stricken out, the court not denying the applicability of the statute, but merely stating that the proper way to have the law presented to the jury is through the request for instructions (R. 397), all this further tending to impress on the minds of the jury the importance of the statute.

While it is true that in a criminal trial immaterial parts of an indictment may be disregarded and the jury directed to so disregard such parts of the indictment, still this rule with regard to surplusage should not be held to apply when the alleged superfluous parts of the indictment are the subject of constant reference during the trial and the jury are necessarily impressed with the lack of performance of an alleged duty which does not exist. The prosecuting attorney (R. 173) in his opening remarks specified that the violation of this alleged Louisiana Law was the basis of the indictment herein (R. 172), and this was corroborated by the statement of the court.

In such a situation, the rights of the defendant are prejudiced. The mind of the jury becomes permeated with the evidence introduced in connection with the parts of the indictment which the jury are afterwards told should be disregarded, and the rule that an instruction by a court to a jury to disregard evidence, after the court allows it in, and damage done, does not cure the error of the admission of such evidence, becomes applicable.

Holt v. *United States,* 94 F. (2d) 90, 94, and cases cited therein.

In that case, a dying declaration was erroneously allowed in evidence. The court said:

> "However, where the character of the evidence is such that it is likely to create so strong an impression on the minds of the jurors to the prejudice of the defendant, that they will be unable to cast it aside in the consideration of the case, a mistrial should be ordered. (*Throckmorton* v. *Holt,* 180 U. S. 552, 567; *Waldron* v. *Waldron,* 156 U. S. 361, 383; *Armour & Co.* v. *Kollmeyer,* 161 F. 78, 83; *Looker* v. *United States,* 240 F. 932, 935; *Maytag* v. *Cummins,* 260 F. 74, 80; *Boyd* v. *United States,* 142 U. S. 450, 458; *Lockhart* v. *United*

States, 35 F. (2d) 905, 906; *C. M. Spring Drug Co.* v. *United States,* 12 F. (2d) 852, 858; *Patterson* v. *State,* 23 Ala. App. 428; *People* v. *McKelvey,* 85 Cal. App. 679; *Hartman* v. *State,* 121 Fla. 627; *Young* v. *Commonwealth,* 220 Ky. 59; *Borders* v. *Commonwealth,* 252 Ky. 577; *Warren* v. *State,* 174 Miss. 63; *Quinn* v. *State,* 54 Okl. Cr. 179; *Stafford* v. *State,* 125 Tex. Cr. R. 174.)"

"The statement purported to be a dying declaration. It was a full and complete narrative of what occurred between Alexander and his alleged coconspirators from the beginning. It was before the jury from early in the trial until the close of the evidence. It must have made a deep and lasting impression on the minds of the jurors. It squarely contradicted Holt's defense that he did not know Alexander was an imposter, while the competent evidence on that issue was far from conclusive.

"We doubt that it was possible for the jury to efface the statement from their minds and to consider the case solely on the competent evidence adduced. In fact, we find it difficult so to do.

"We are of the opinion that the instruction of the court to the jury to disregard the statement did not cure the error in its admission, and that the motion for a mistrial should have been granted."

Here the Louisiana bidding statute "was before the jury from early in the trial until the close of the evidence" and "must have made a deep and lasting impression on the minds of the jurors" and, certainly, in the present case it was not possible for "the jury to efface" the bidding statute "from their minds", and the instruction "to disregard" the statute as surplusage did not cure this.

II.

Cross-examination of petitioner as to private business transactions in which he made personal profits and the subsequent examination of the Witness Hill, who refused to answer on the ground of self-incrimination, and the reference to this subject in the summing up by the prosecution and the charge of the judge on this subject, were so prejudicial as to render the trial wholly unfair; the mere fact that no objection was taken to said cross-examination is immaterial.

Another reversible error committed on the trial were the questions on cross-examination of the defendant as to other acts of the defendant, which were totally irrelevant. Notwithstanding that the Judge at the outset of the trial ruled (R. 608, 609) that the defendant's other business transactions were not relevant to the crime charged, the defendant was asked on cross-examination whether he received any commissions (R. 620) on any transactions while Governor of the State, and these transactions were the subject of lengthy interrogation. One was a transaction with the East Texas Refining Company; another, gas contracts that Feazel had with the United Gas Company. These contracts were wholly legitimate private affairs (R. 665; see assignment of error, R. 1058, 1059) and had nothing to do with the State of Louisiana or any other public body. True, the defendant had put no money in these deals, but commissions are made every day by persons who invest no capital, and these transactions do not bear the slightest resemblance to the transactions which were the subject of the indictment in any way whatsoever.

A public officer can properly earn profits in private business affairs. He is not forbidden to make investments or earn money or receive profits in independent business.

In *State of Iowa* v. *Hinshaw,* 197 Ia. 1265, 1272, the court said:

> "A public officer is not required to give every instant of his time to the public service in such a sense that he cannot, if wholly consistent with public duties, perform any other service or earn money from any other source. His first and paramount duty is to perform all of the requirements of his office; but he is not barred, because he holds public office, from investing his funds in a legitimate business enterprise, nor prohibited from receiving profits from an independent business in which he may have an interest."

In order that these transactions, brought out on cross-examination, should be admissible, they at least should have had some relevancy. They are totally remote and do not come within the category of admissible similar transactions.

The prejudice to the defendant of admitting reference to these private affairs appears from the fact that the Judge not only referred to the subject in his charge (R. 772), the prosecution (R. 721, 722, 725, 726, 727, 744) referred to it in its summing up, but the Judge based his sentence largely on these other alleged wrongful acts on the part of the defendant.

The witness Hill was examined by the prosecution on these private business deals. He refused to answer (R. 689) on the ground that the answers would tend to incriminate him. Subsequently, the prosecution utilized this refusal on the part of Hill as a ground for asserting that these business deals on the part of the petitioner must have been illegal (R. 721, 722).

While the rule in the Federal courts is very broad in permitting evidence of similar acts, nevertheless the rule has certain limitations, as appears in the case of *Niederluecke* v. *United States,* 21 F. (2d) 511, 513, where the Court, quoting

from 8 Ruling Case Law, p. 206, § 200, states the law as follows:

> " 'Whatever may be the object of evidence as to other offenses—whether to prove motive, intent or guilty knowledge, or to show a general plan or scheme, or to prove identity, or to establish sexual intimacy and opportunity—proof of a distinct substantive crime is never admissible unless there is some logical connection between the two, from which it can be said the one tends to establish the other. Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence, it is obvious it should not be received, unless the mind plainly perceives that the commission of the one tends, by a visible connection, to prove the commission of the other by the prisoner.' "

In his charge to the jury, the trial judge said this evidence was admissible

> "as bearing upon the probability of whether or not he did, as some of the evidence tends to show, in effect take charge of the purchase of these trucks and to see that they were purchased in the manner which the Government contends in this case. I repeat again, what I say in this respect is not binding upon you, but it is for you to determine whether the Governor did that, or whether he had any connection with the matter at all." (R. 772, 773.)

The evidence was totally inadmissible, not being in the slightest degree similar to the case on trial. This evidence, true, was not objected to. In view of all the circumstances, the admission into evidence of these alleged simi-

lar acts becomes reversible error, although no exception is taken.

This Court has ruled that the court, of its own motion, can direct a new trial if the errors at the trial seriously affect the fairness, integrity or public reputation of judicial proceedings.

In *New York Cent. R. Co.* v. *Johnson,* 279 U. S. 310, the court said (pp. 318, 319):

> "But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy * * * of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice. See *Union Pac. R. Co.* v. *Field* (C. C. A.) 137 F. 14, 15; *Brown* v. *Swineford,* 44 Wis. 282, 293. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error. *Brasfield* v. *United States,* 272 U. S. 448, 450."

In the case of *Patterson* v. *State of Alabama,* 294 U. S. 600, Chief Justice Hughes said as follows (p. 607):

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires."

Is there any doubt, when the trial judge admits evidence of other unrelated acts, a lay jury will consider this inadmissible testimony and be controlled by it?

In view of the fact that the Judge at the outset of the trial (R. 608, 609) ruled that the defendant's other business

transactions, the same ones in fact complained of here, had no relevancy whatsoever to the crime charged, the defendant should have had the protection of the Court, first in having the testimony on the Court's own motion excluded, and secondly in having the prosecuting attorney reprimanded for referring to these other matters in no sense similar in any respect to the subject matter of the trial.

III.

Under the authority of Stapp v. United States, 120 F. (2d) 898, decided by the Circuit Court of Appeals for the Fifth Circuit, after the decision in this case by that same court, the use of the mails, which constitutes the alleged mailing essential to a mail fraud prosecution, having occurred after the consummation of the alleged fraudulent scheme, the petitioner is entitled to a reversal of the conviction. The conflict between the decision in this case and the decision in the Stapp case should be settled by this Court.

Believing firmly that the mailing upon which the second and third counts of the indictment are based falls wholly without not only the letter, but the contemplation of the statute, petitioner begs leave to submit additional authorities on this point.

On June 12, 1941, the Circuit Court of Appeals for the Fifth Circuit rendered its decision in the case of *Stapp* v. *United States, supra,* and it is respectfully submitted that the holding in the *Stapp* case relative to the use of the mails is in direct conflict with that in the instant case. In the *Stapp* case, defendants entered into a scheme to defraud Christian in the purchase of a certain oil lease. The defendant Stapp was represented to be the agent of an oil company authorized to purchase the said lease from the

defendant Rudder for $8,000, but that in truth said lease could be purchased from Rudder for $4,800. The purpose of the scheme was that Christian should buy it from Rudder for $4,800 and that then Stapp would buy it from Christian for $8,000, Christian and Stapp to divide the profit of $3,200.

Christian obtained a letter of credit for $5,000 from the Citizens Bank of Tyler, Texas. He took this letter of credit to the Pauls Valley National Bank, Pauls Valley, Oklahoma, and bought the lease, drawing a check on the Tyler Bank in favor of the Pauls Valley Bank for the $4,800, for which the Pauls Valley Bank issued its cashier's check to Rudder in payment for the lease. Rudder cashed his check with the Pauls Valley Bank and received the cash. Christian's check on the Tyler Bank and the letter of credit was sent by the Pauls Valley Bank to the Liberty National Bank at Oklahoma City, which bank forwarded it to the Fort Worth National Bank for collection. The Fort Worth Bank in the regular course of its business mailed Christian's check and the letter of credit back to the Tyler Bank, and this mailing was the basis of the indictment.

In its opinion the Court stated the general rule:

> "The mailing or causing the letter to be mailed is the crime, not merely devising the fraudulent scheme, and it is vital to the commission of the offense that the letter be in furtherance of the scheme."

The Court further stated:

> "In this case it is apparent the purpose of the scheme to defraud Christian had been completely accomplished when the Pauls Valley Bank accepted his check on the Tyler Bank and the money was paid to Rudder. Christian was then and there defrauded. Up to that point the mails had not been used at all. Christian could not have legally done anything to stop payment of his check and was obligated to reimburse the Pauls

> Valley Bank for cashing it. While the mails were incidentally used, the defendants had no interest whatsoever in that transaction."

Petitioner respectfully urges that the mailing upon which the second and third counts of this indictment are based is even further removed and more remote from the alleged scheme than the mailing in the *Stapp* case, *supra*. It is further respectfully urged that the mailing, made the basis of counts 2 and 3, could not in any sense be considered in furtherance of the alleged scheme.

The record shows that on September 16, 1938 the Louisiana Highway Commission issued its warrant (R. 953) No. 152-9, payable to the order of the Younger Motor Truck Corporation in the sum of $170,158.51.

On the same day the Younger Motor Truck Corporation signed a receipt (R. 955), accepting the said warrant in settlement of its account.

Highway Commission Warrant No. 152-9 (R. 953) was unconditionally endorsed by the Younger Motor Truck Corporation and sold to the banking firm of Newman, Harris & Company, which firm on September 17, 1938 issued its check No. 1950 (R. 957) to the Younger Motor Truck Corporation in the sum of $170,158.51.

In the language of the *Stapp* case, *supra*, if there was any fraud, the Louisiana Highway Commission was "then and there defrauded". To further quote from the *Stapp* case, "up to that point the mails had not been used at all". The Louisiana Highway Commission "could not have legally done anything to stop payment" of its warrant No. 152-9 "and was obligated to reimburse" the holder in due course and for value, namely, Newman, Harris & Company.

If the check of Newman, Harris & Company issued to the Younger Motor Truck Corporation in the sum of

$170,158.51 had been sent through the mails or if the Highway Commission warrant No. 152-9 purchased by Newman, Harris & Company had been sent through the mails, there would still have been no wrongful use of the mails under the statute, according to the *Stapp* case, *supra*, but neither the said check nor the said warrant were in any way involved in the mailing. Therefore, the mailing charged in counts 2 and 3 of this indictment is even more remote from the execution of the alleged scheme.

The additional "distance" between these mailings and the alleged scheme to defraud is clearly shown by the record. The Younger Motor Truck Corporation deposited the check of Newman, Harris & Company in its bank account in the Guaranty Bank & Trust Company of Alexandria, Louisiana, on September 19, 1938 (R. 958). No subsequent mailing of this check by the bank is either charged or proven. This is another significant milestone in showing the remoteness of the mailing.

On September 17, 1938, the Younger Motor Truck Corporation drew a draft (R. 971) on the Louisiana National Bank of Baton Rouge to the order of James Thomas in the sum of $22,000, in payment of his commission on the sale of the trucks.

Thomas endorsed and deposited this draft (R. 972) in his bank account in the City National Bank of Baton Rouge. The ledger sheet of Thomas' account in the City National Bank (R. 973) shows a balance of only $2,267.30 prior to the depositing of the $22,000 draft. Thomas immediately drew upon said account in the sums of $2,410.36 and $10,020.83 (R. 973). Up to this point "the mails had not been used at all". Payment could not have been stopped on the draft for $22,000 issued by the Younger Motor Truck Corporation to Thomas, and the Louisiana Highway Commission, if there was fraud, had long since been defrauded when its negotiable warrant had been purchased by New-

man, Harris & Company, an innocent holder in due course and for value.

The City National Bank of Baton Rouge forwarded the $22,000 draft to the Commercial National Bank of Shreveport, Louisiana, along with other items for collection (R. 272-273). Up to this distant point no use of the mails in furtherance of the alleged scheme was either charged or proven. At this point the alleged scheme to defraud had long been lost sight of in the dust of a lengthy and tortuous trail.

Thereafter, the Commercial National Bank of Shreveport "sent" the said draft to the Rapides Bank & Trust Company of Alexandria, Louisiana, and this constituted the alleged mailing upon which counts 2 and 3 of this indictment are based and founded.

The record further shows that all alleged payments by Thomas to petitioner (R. 701) were made prior to the receipt by Thomas of the said draft.

If the holding in the *Stapp* case, *supra,* be correct—and we respectfully submit that it is—then certainly the alleged mailing in counts 2 and 3 of this indictment, being much more remote, can certainly not be said to have been "in furtherance of the scheme". If the holding in the *Stapp* case be not sound, we then respectfully submit that there is such a divergence in the opinions of the same Court, rendered at approximately the same time, as to clearly invoke the supervisory powers of this Court.

To summarize—It is our contention that, when the negotiable warrant No. 152-9 of the Louisiana Highway Commission was sold by the Younger Motor Truck Corporation to Newman, Harris & Company for value, if there was any fraud the Highway Commission was "then and there defrauded". It could not legally do anything to stop payment on said warrant. Newman, Harris & Company be-

came a holder in due course for value and all of the legal defenses of such a position immediately surrounded them.

But there is an additional step even beyond this. On September 16, 1938, the day upon which it purchased the warrant from the Truck Corporation, Newman, Harris & Company sold the warrant to a bank. This is proved (R. 977) by the letter of confirmation to Newman, Harris & Company reading as follows:

> "This will confirm our purchase from you today of 170,158.51 State of Louisiana 4% Highway Warrants due December 31, 1938, at 100 flat plus commission of $1.00 per thousand. We have today wired the National Bank of Commerce, New Orleans, to accept these warrants on September 17 and pay you $170,328.67 upon presentation."

On the same page of the Record (977) is the letter from the National Bank of Commerce in New Orleans to the Commercial National Bank in Shreveport, authorizing payment for the warrant.

All of this establishes beyond any doubt whatsoever that long prior to the alleged mailing the Highway Commission warrant, passing through the hands of various individuals and banks who were innocent third holders in due course and for value, irretrievably passed beyond any power of the Highway Commission to stop payment or to in any way legally deny its obligation. By whatever view may be taken, there can be no doubt that the object of the alleged scheme had been accomplished and that, in view of the many successive steps which followed, the alleged mailing of the draft could not have been "in furtherance of the scheme."

The law is clear that the object of the fraudulent scheme is fully accomplished, not only when the victim has actually parted with his money, but when his check or other evidence

of indebtedness has passed into the hands of innocent third persons in due course or for value received or has reached any position where payment thereof may not legally be stopped.

Stapp v. *United States, supra;*
Meyer v. *United States,* 220 Fed. 800, 805;
Mitchell v. *United States,* 118 F. (2d) 653;
Dyhre v. *Hudspeth,* 106 F. (2d) 286, 288;
McNear v. *United States,* 60 F. (2d) 861, 863.

That Warrant No. 152-9 of the Louisiana Highway Commission had passed beyond the legal ability of the Commission to stop payment or deny the obligation, is clearly shown by the following from Dart's Louisiana General Statutes, Vol. 1, § 846:

> "846. TITLE AND RIGHTS OF HOLDER IN DUE COURSE.—A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. (Acts 1904, No. 64, § 57.)"

Further proof that, if the Highway Commission was defrauded, the scheme was completed and fulfilled when Newman, Harris & Company purchased the warrant, is evidenced by the fact that, had the Younger Motor Truck Corporation deposited the Newman, Harris check and thereafter paid Thomas his $22,000 commission in cash, instead of by the draft in question, the Highway Commission would have been in no better position than that in which it found itself because the Truck Company chose to pay Thomas his commission by the draft.

The Government contends that the issuance of the draft by the Truck Company to Thomas was in payment of the spoils

or fruits of the alleged scheme to defraud. The authorities above quoted and numerous other authorities make it extremely doubtful if use of the mails in payment of the fruits of the scheme constitute such use "in furtherance of the scheme" as to come within the statute, but argument on this point is unnecessary because we point out in conclusion that Younger, because he was concededly a party to the alleged scheme to defraud, acted on behalf of the other parties in whatever actions he may have taken relative to the consummation of the alleged scheme. We, therefore, point out that, when Younger or the Younger Motor Truck Corporation accepted from Newman, Harris & Company their check in the sum of $170,158.51, he acted for and on behalf of his alleged co-schemers and that the said check, which he accepted for the full amount, included the $22,000 commission which he later paid to Thomas. Therefore, the fruits, so-called, of the alleged scheme were represented by the check of Newman, Harris & Company, which was in no way involved, allegedly or otherwise, in the use of the mails, so there can be no question of a doubt but that the alleged scheme was fully terminated and completed in all of its objects when one of the alleged co-conspirators accepted the check, which included, among other things, the alleged illegal profits.

When Younger, an alleged co-conspirator, had in his possession the fruits of the alleged scheme to defraud, he held them for his alleged co-schemers, as well as for himself. Therefore, the subsequent payment by Younger to Thomas was in no way whatsoever connected with the alleged scheme to defraud and the long journey taken by the $22,000 draft, which culminated in the alleged mailing, which was never proved, by a third bank to a fourth bank for collection, was about as remote as any circumstance could be conceived with reference to the mailing "in furtherance of the scheme."

IV.

The draft of $22,000 in favor of Thomas, drawn by the Younger Motor Truck Corporation, representing a part of the profits under the alleged scheme to defraud, having been deposited in the City National Bank of Baton Rouge, and thereafter sent by that bank to a third bank and then allegedly mailed by this third bank to still another bank, not named in the draft, such incidental use of the mails is not "caused" by the defendant nor "according to the direction thereon" and does not come within the mail fraud statute.

The draft (R. 971), made the basis of counts 2 and 3 in the indictment, was addressed to the Guaranty Bank & Trust Company, Alexandria, Louisiana. This draft was deposited (R. 972) in the City National Bank of Baton Rouge by Thomas. The City National Bank of Baton Rouge forwarded the draft, along with other items for collection (R. 272, 273) to the Commercial National Bank of Shreveport. The Commercial National Bank of Shreveport allegedly mailed this draft to the Rapides Bank & Trust Company of Alexandria, Louisiana, and this alleged mailing is the basis of counts 2 and 3 of the indictment.

The City National Bank of Baton Rouge was in no sense the agent of Thomas for the purpose of collecting the amount of the draft.

Burton v. *United States*, 196 U. S. 283;
City of Douglas v. *Federal Reserve Bank*, 271 U. S. 489;
Daykin v. *Bayly*, 290 U. S. 143.

Certainly, the subsequent alleged mailing of the draft by the Commercial Bank of Shreveport to the Rapides Bank & Trust Company could not reasonably have been

foreseen by Thomas and, therefore, not "caused" * by him. Furthermore, this alleged mailing, made the basis of the counts, was not "according to the direction thereon" *, as the draft was drawn upon and addressed to, not the Rapides Bank & Trust Company, but the Guaranty Bank & Trust Company of Alexandria, Louisiana.

Thomas could not possibly have foreseen or in any way anticipated the mailing by a bank in a distant city, which entered in no wise into the transaction, to still another bank, upon which the draft was not drawn and to which it was not addressed.

To quote the *Stapp* case, *supra*:

> "While the mails were incidentally used, the defendants had no interest whatsover in that transaction."

As pointed out above in Point III, the alleged fraudulent scheme was entirely completed and consummated when Newman, Harris & Company purchased the Highway Commission warrant for value and gave its check therefor to Younger. Neither the Highway Commission warrant nor the Newman, Harris check are involved in the mailing and counts 2 and 3 must fall because, first, the alleged scheme was fully consummated; second, the alleged use of the mails was not "in furtherance of the scheme"; third, the incidental mailing was not "caused" by Thomas; and fourth, the alleged mailing was not "according to the direction thereon".

Conclusion.

Petitioner respectfully urges upon this Court no more and no less than the privilege of being heard and, in presenting the above additional reasons in support of his application for a writ of certiorari, does not abandon, but, on the contrary, reiterates and reaffirms all of the

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* See language of 18 U. S. Code § 338.

matters raised in his original petition for a writ of certiorari.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, that the order denying certiorari be vacated and certiorari granted, and that the case be assigned for argument.

Respectfully submitted,

MARTIN W. LITTLETON,
OTTO C. SOMMERICH,
Counsel for Petitioner.

Certificate of Counsel.

We, Martin W. Littleton, Jr. and Otto C. Sommerich, counsel for the above-named Richard W. Leche, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

MARTIN W. LITTLETON,
OTTO C. SOMMERICH,
Counsel for Petitioner.